No. 85-5542

In the Supreme Court of the United States

OCTOBER TERM, 1985

ALVIN BERNARD FORD, or CONNIE FORD, individually,
and as next friend on behalf of
ALVIN BERNARD FORD, PETITIONER

v.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

RICHARD L. JORANDBY
Public Defender, 15th
Judicial Circuit of Florida

CRAIG S. BARNARD
Chief Assistant Public
Defender

RICHARD H. BURR, III *
Assistant Public Defender

LAURIN A. WOLLAN, JR.
Of Counsel
Harvey Bldg., 13th Floor
224 Datura Street
West Palm Beach, FL 33401
(305) 837-2150
Counsel for Petitioner

* Counsel of Record

JIM SMITH
Attorney General of Florida

JOY B. SHEARER *
Assistant Attorney General
111 Georgia Avenue
Room 204
West Palm Beach, FL 33401
(305) 837-5062
Counsel for Respondent

PETITION FOR CERTIORARI FILED OCTOBER 1, 1985
CERTIORARI GRANTED DECEMBER 9, 1985

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

RELEVANT DOCKET ENTRIES IN THE COURTS BELOW

DATE	PROCEEDINGS
	[Circuit Court of the Seventeenth Judicial Circuit of Florida]
May 21, 1984	FILED: [Mr. Ford's] Motion for Hearing and Appointment of Experts for Determination of Competency To Be Executed, and for Stay of Execution During the Pendency Thereof
May 21, 1984	ORDER denying said motion
May 22, 1984	FILED: Notice of Appeal
	[Supreme Court of Florida]
May 23, 1984	FILED: Brief of Appellant [Ford] or Application for Extraordinary Relief
May 24, 1984	FILED: Answer Brief of Appellee or Response to Application for Extraordinary Relief
May 25, 1984	ORAL ARGUMENT
May 25, 1984	OPINION denying Mr. Ford's application for a hearing to determine competency
	[United States District Court for the Southern District of Florida]
May 25, 1984	FILED: Petition for Writ of Habeas Corpus
May 25, 1984	FILED: Response to Petition for Writ of Habeas Corpus
May 29, 1984	HEARING: argument on petition and request for stay of execution

DATE	PROCEEDINGS
May 29, 1984	ORDER denying Petition for Writ of Habeas Corpus and stay of execution
May 29, 1984	FILED: Notice of Appeal
	[United States Court of Appeals for the Eleventh Circuit]
May 30, 1984	ORAL ARGUMENT on Mr. Ford's application for stay of execution and for certificate of probable cause
May 30, 1984	ORDER and OPINION granting stay of execution and certificate of probable cause
	[Supreme Court of the United States]
May 31, 1984	FILED: Application of the State of Florida to Vacate Order of Eleventh Circuit Granting Stay of Execution
May 31, 1984	FILED: Response to Application of Louie L. Wainwright to Vacate Order of Eleventh Circuit Granting Stay of Execution
May 31, 1984	ORDER denying application to vacate stay of execution
	[United States Court of Appeals for the Eleventh Circuit]
July 30, 1984	FILED: Brief for Petitioner-Appellant
August 27, 1984	FILED: Brief for Respondent-Appellee
September 18, 1984	ORAL ARGUMENT
January 17, 1985	OPINION affirming the denial of habeas corpus relief
February 6, 1985	FILED: Suggestion for Rehearing En Banc

DATE	PROCEEDINGS
June 3, 1985	ORDER denying rehearing en banc
June 20, 1985	ORDER denying stay of mandate and issuing mandate
	[Supreme Court of the United States]
August 20, 1985	ORDER extending time to file petition for writ of certiorari
October 1, 1985	FILED: Petition for Writ of Certiorari
October 23, 1985	FILED: Respondent's Brief in Opposition to Petition for Writ of Certiorari
October 31, 1985	FILED: Motion of National Association of Criminal Defense Lawyers for leave to file brief as *amicus curiae*
October 31, 1985	FILED: Motion of Office of Capital Collateral Representative for the State of Florida, et al. for leave to file brief as *amici curiae*
December 9, 1985	ORDER granting petition for writ of certiorari and motions for leave to file briefs as *amici curiae*

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

Case No. 74-2159cf

STATE OF FLORIDA

vs.

ALVIN BERNARD FORD, DEFENDANT

ORDER

THIS CAUSE having come on before the court upon the Defendant's Motion for Hearing and Appointment of Experts for Determination of Competency to be Executed, and for Stay of Execution During the Pendency Thereof, it is hereby

ORDERED AND ADJUDGED that the Defendant's motion be and it hereby is Denied.

DONE AND ORDERED in Chambers, Broward County, Florida, this 21st day of May, 1984.

/s/ John G. Ferris
Circuit Judge
For and at the Direction of:
J. Cail Lee, Circuit Judge

SUPREME COURT OF FLORIDA

Nos. 65335, 65343

ALVIN BERNARD FORD, or CONNIE FORD, individually, and acting as next friend on behalf of ALVIN BERNARD FORD, PETITIONER

v.

LOUIE L. WAINWRIGHT, Secretary, Dept. of Corrections, State of Florida, RESPONDENT

ALVIN BERNARD FORD, ETC., APPELLANT

v.

STATE OF FLORIDA, ETC., APPELLEE

May 25, 1984

ADKINS, Justice.

We have before us a petition for habeas corpus and an application for stay of execution in order to allow a hearing to determine petitioner's competency. We have jurisdiction. Art. V, § 3(b)(7), (9), Fla. Const.

The petitioner was convicted in the Circuit Court of the Seventeenth Judicial Circuit on December 17, 1974, for the first-degree murder of a Fort Lauderdale police officer. The jury recommended death, and the trial court imposed a sentence of death on January 6, 1975. This

Court affirmed petitioner's conviction and sentence of death in *Ford v. State*, 374 So.2d 496 (Fla. 1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980).

Petitioner then filed a motion to vacate or set aside the judgment pursuant to Florida Rule of Criminal Procedure 3.850. The circuit court denied the motion, and its denial was affirmed by this Court. *Ford v. State*, 407 So.2d 907 (Fla.1981).

Petitioner's subsequent petition for writ of habeas corpus was denied by the United States District Court for the Southern District of Florida. Upon appeal, a divided panel of the United States Court of Appeals for the Eleventh Circuit affirmed the district court's denial of relief. *Ford v. Strickland*, 676 F.2d 434 (11th Cir.1982). Rehearing en banc was granted, and the en banc court affirmed the district court's judgment. *Ford v. Strickland*, 696 F.2d 804 (11th Cir.1983). Certiorari was denied in *Ford v. Strickland*, —— U.S. ——, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983).

Thereafter proceedings to determine petitioner's mental competency were instituted pursuant to section 922.07, Florida Statutes (1983). As required by this statute, Governor Graham appointed a commission of three psychiatrists to evaluate petitioner's sanity. The reports of the psychiatrists were submitted to the Governor, and he signed a death warrant for petitioner on April 30, 1984, requiring petitioner to be executed between noon on May 25, 1984, and noon on June 1, 1984. Petitioner is currently scheduled to be executed on May 31, 1984.

In addition to the proceedings that were instituted on behalf of petitioner pursuant to section 922.07, petitioner's counsel also filed a motion in the trial court for a hearing to determine petitioner's competency and for a stay of execution during the pendency thereof. The trial court denied the motion on May 21, 1984.

Petitioner raises two issues in his petition for writ of habeas corpus. The first of these concerns a jury instruc-

tion given to the jury in the sentencing phase that its advisory verdict of either life imprisonment or death must be reached by a majority vote of the jury. Specifically, petitioner argues that intervening law has established that such an instruction is erroneous, and that but for the erroneous instruction the jury's verdict "most probably" would have been for life imprisonment.

This alleged error occurred during the sentencing proceeding in the trial court and therefore, the explicit proscription contained in Florida Rule of Criminal Procedure 3.850 applies here:

> An application for writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this rule, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

In his first motion for post conviction relief in late 1981, petitioner raised other challenges to the instructions given during the sentencing phase, but did not raise this issue. Thus, petitioner is not entitled to raise the issue here. *See Johnson v. State*, 185 So.2d 466, 467 (Fla. 1966); *Finley v. State*, 394 So.2d 215, 216 (Fla. 1st DCA 1981); *Darden v. Wainwright*, 236 So.2d 139 (Fla. 2d DCA 1970).

Furthermore, petitioner's reliance on *Rose v. State*, 425 So.2d 521 (Fla.), *cert. denied*, —— U.S. ——, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983), and *Harich v. State*, 437 So.2d 1082 (Fla.1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984), is misplaced. This Court has recently clarified that the error which petitioner alleges here requires an objection at trial before relief can be granted on direct appeal. *See Rembert v. State*, 445 So.2d 337, 340 (Fla.1984); *Jackson v. State*,

438 So.2d 4, 6 (Fla.1983). The excerpt from the transcript of the sentencing phase of petitioner's trial which is appended to the instant petition shows that there was no objection to the instruction in the trial court. Thus, any alleged error in the contested jury instruction has been waived by the lack of a contemporaneous objection at trial, and any relief in this proceeding is precluded by the well-established rule that habeas corpus may not be used as a vehicle to raise for the first time issues which could or should have been raised at trial and on appeal. *McCrae v. Wainwright*, 439 So.2d 868, 870 (Fla.), *cert. denied*, —— U.S. ——, 103 S.Ct. 2112, 77 L.Ed.2d 315 (1983); *Hargrave v. Wainwright*, 388 So.2d 1021 (Fla.1980).

Additionally, the instructions given to the jury accurately tracked the statute that was in effect at the time and that remains unchanged. It was a change in the standard jury instructions which prompted our decision in *Harich*. However, this Court has held that the *Harich* case does not constitute a change in the law which will merit relief in a collateral proceeding under the rule of *Witt v. State*, 387 So.2d 922 (Fla.), *cert. denied*, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980). *Jackson*, 438 So.2d at 6.

Moreover, as we held in *Harich* and *Jackson*, the record in this case does not establish that petitioner was prejudiced by the instructions as delivered. Petitioner attempts to construct his claim of prejudice based almost entirely upon the response by one juror as the jury was being polled regarding whether the verdict was by a majority vote of the jury, one juror responded: "The second time it was." From this response petitioner reasons that initially a majority of the jury did not vote for the death penalty, and then builds to a conclusion that "the erroneous instruction was determinative of the outcome. . . ." However, it is well known that juries often take an initial vote to see where the members stand in order to channel their discussion. The mere fact that a second vote was taken does not establish anything in this record

to indicate that the jury felt compelled to reach a conclusion that they would not otherwise have reached. Petitioner's assertion to that fact is based purely upon conjecture, but this Court has stated that reversible error cannot be predicated on conjecture. *See Sullivan v. State*, 303 So.2d 632, 635 (Fla. 1974), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976).

Petitioner's second claim in this proceeding is that the death penalty is applied in Florida in an arbitrary and discriminatory manner on the basis of race, geography, etc., in violation of the eighth and fourtenth amendments. This claim has never been raised by petitioner in a motion for post-conviction relief; therefore, it cannot be raised for the first time in this original habeas corpus proceeding. *See Johnson v. State*, 185 So.2d 466, 467 (Fla.1966); *Finley v. State*, 394 So.2d 215, 216 (Fla. 1st DCA 1981); *Darden v. Wainwright*, 236 So.2d 139 (Fla. 2d DCA 1970). Further, this same issue, based upon the same data, has been presented to and rejected by this Court in *Sullivan v. State*, 441 So.2d 609 (Fla.1983), and most recently in *Adams v. State*, 449 So.2d 819 (Fla.1984). Petitioner concedes as much, but requests that this Court reconsider its prior holdings on this issue. We decline to do so.

Petitioner's counsel has also filed a separate brief in this proceeding requesting this Court to remand for a hearing in the circuit court to determine whether petitioner is presently insane. Petitioner argues that a separate judicial determination of sanity must be made apart from the statutory procedure in section 922.07, Florida Statutes (1983), which directs the governor to make such a determination. This is so, petitioner contends, because Florida has an established common law right to a determination of a prisoner's competency to be executed. However, when the early Florida decisions held that an application to the trial court must be made for a determination of sanity, section 922.07 had not been enacted. It is an accepted rule of statutory construction that the legislature

is presumed to be acquainted with judicial decisions on the subject concerning which it subsequently enacts a statute. *Main Insurance Co. v. Wiggins*, 349 So.2d 638, 642 (Fla. 1st DCA 1977); *Bermudez v. Florida Power and Light Co.*, 433 So.2d 565, 567 (Fla. 3d DCA 1983), *review denied*, 444 So.2d 416 (Fla.1984). Thus, the statutory procedure is now the exclusive procedure for determining competency to be executed.

In *Goode v. Wainwright*, 448 So.2d 999 (Fla.1984), we addressed this issue, agreed "that an insane person cannot be executed," and held that section 922.07 sets forth "the procedure to be followed when a person under sentence of death appears to be insane. The execution of capital punishment is an executive function and the legislature was authorized to prescribe the procedure to be followed by the governor in the event someone claims to be insane." Thus, in *Goode* we held that under section 922.07 the governor can make the determination; *Goode* does not stand for the proposition that the issue of sanity to be executed can be raised independently in the state judicial system. As we recognized in *Goode*, the United States Supreme Court in *Solesbee v. Balkcom*, 339 U.S. 9, 70 S.Ct. 457, 94 L.Ed.2d 604 (1950), has held that a procedure like Florida's whereby the governor determines the sanity of an already convicted defendant does not offend due process. Like Goode, the petitioner has exercised his right to use the full processes of the judicial system. Therefore, *Goode* is dispositive of the instant case.

Accordingly, petitioner's application for a hearing to determine competency and a stay of execution is hereby denied. The petition for writ of habeas corpus is also denied.

It is so ordered.

ALDERMAN, C.J., and BOYD, McDONALD and EHRLICH, JJ., concur.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

[Title Omitted in Printing]

PETITION FOR WRIT OF HABEAS CORPUS BY PERSON IN STATE CUSTODY

To the Honorable Norman C. Roettger, Jr., Judge of the District Court for the Southern District of Florida.

1. The Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida entered the judgment under attack. The Court is located in Fort Lauderdale, Florida.

2. Mr. Ford entered a plea of not guilty, and a judgment thereon was entered on December 7, 1974. After advisory sentence of death was returned by the jury, the court entered a death sentence on January 6, 1975.

3. Mr. Ford was sentenced to death by electrocution.

4. Mr. Ford was indicted for first degree murder of Dimitri Ilyankoff.

5. Mr. Ford entered a plea of not guilty.

6. Mr. Ford's trial was before a jury.

7. Mr. Ford did not testify at his trial.

8. Mr. Ford appealed his conviction and sentence.

9. The Supreme Court of Florida affirmed the conviction and death sentence on July 18, 1979, and denied rehearing on September 24, 1979. *Ford v. State*, 374 So.2d 496 (Fla. 1979). Certiorari was denied on April 14, 1980. *Ford v. Florida*, 445 U.S. 972.

10. Thereafter, Mr. Ford pursued state post-conviction and federal habeas corpus remedies. His motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850 was denied by the Circuit Court in Broward County, and its denial was affirmed by the

Supreme Court of Florida. *Ford v. State*, 407 So.2d 907 (Fla. 1981). Mr. Ford's subsequent petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida was denied in an unreported opinion, and Mr. Ford appealed. On April 15, 1982, a divided panel of the United States Court of Appeals for the Eleventh Circuit affirmed the district court's denial of relief. *Ford v. Strickland*, 676 F.2d 434 (11th Cir. 1982). Rehearing en banc was granted, and the en banc court affirmed the district court's judgment. *Ford v. Strickland*, 696 F.2d 804 (11th Cir. 1982). Certiorari was thereafter denied. *Ford v. Strickland*, —— U.S. ——, 104 S.Ct. 201 (1983).

11. On October 20, 1983, the undersigned counsel invoked the procedures of *Fla. Stat.* § 922.07 (1983) on behalf of Mr. Ford. Pursuant to this statute, Governor Graham appointed a commission of three psychiatrists to evaluate Mr. Ford's current sanity in light of the statutory standards for determining sanity at the time of execution. The commission members each thereafter reported their findings to Governor Graham, and on April 30, 1984, Governor Graham signed a Death Warrant for Mr. Ford. No findings were made by Governor Graham with respect to Mr. Ford's sanity, but the signing of the Death Warrant signified that the Governor had concluded that in his view Mr. Ford was sufficiently sane to be executed. The Death Warrant signed by Governor Graham permits the execution of Mr. Ford during the week beginning noon, Friday, May 25, 1984, and ending noon, Friday, June 1, 1984. The Superintendent of Florida State Prison has scheduled Mr. Ford's execution for Thursday, May 31, 1984, at 7:00 a.m.

12. On May 21, 1984, a "motion for a hearing and appointment of experts for determination of competency to be executed, and for a stay of execution during the pendency thereof" together with a supporting memorandum of law and an appendix containing documentation of Mr. Ford's present incompetency was filed in the state trial court on behalf of Mr. Ford. The motion set out in

detail the facts relating to Mr. Ford's mental status and was certified under oath to be made in good faith by the undersigned counsel. Because of his mental condition, the motion was presented by Mr. Ford's mother, Connie Ford, individually and as next friend to her son Alvin Bernard Ford. Connie Ford's affidavit setting forth next friend allegations was attached to the motion. Within four hours of filing the motion, memorandum, and appendix and although the trial judge was out of town, the judge denied the motion without findings:

> This cause having come before the Court upon the defendant's Motion for Hearing and Appointment of Experts for Determination of Competency to Be Executed and for Stay of Execution During the Pendency thereof, it is hereby
>
> ORDERED AND ADJUDGED that the defendant's motion is Denied.
>
> DONE AND ORDERED in Chambers at Broward County, Florida this 21st day of May, 1984.

13. Review of the lower court's order was sought in the Supreme Court of Florida by the filing of a notice of appeal on May 22, 1984 and the filing of a brief or application for extraordinary relief on May 23, 1984. Oral argument was heard on May 25, 1984. On May —, 1984 the Supreme Court denied relief. *Ford v. State*, —— So. 2d ——, No. —,— (Fla. 1984).

14. In addition to the aforementioned action, Mr. Ford also filed an original petition for writ of habeas corpus in the Supreme Court of Florida on May 22, 1984. This petition was denied by the opinion of May —, 1984.

Next Friend Allegations

15. Movant, CONNIE FORD, is the mother of Alvin Bernard Ford, who is presently incarcerated on death row at Florida State Prison and is scheduled to be executed on May 31, 1984, at 7:00 a.m.

16. Mrs. Ford brings the present proceeding individually and acting as next friend on behalf of her son, because he is presently incompetent and is incapable of maintaining the proceedings himself, or of protecting his own right not to be subjected to the execution of his death sentence when he is incompetent.

17. Mrs. Ford alleges the following facts and incorporates the averments in her attached affidavit (Attachment A) in support of her status as next friend acting on behalf of Alvin Bernard Ford in this litigation:

A. Until sometime during the first six months of 1982, Alvin Bernard Ford suffered from no mental illness or disorder known to Mrs. Ford. However, sometime during this period in 1982, Alvin Ford began to develop a serious mental illness or disorder which, in the intervening time, has become so severe that he no longer is competent to protect his own legal interests, to understand why he is to be executed, or to assist himself in the face of his impending execution.

B. As demonstrated in Attachment A, during the period of time since the summer of 1982, Alvin Ford has grown increasingly distant from his mother and his family. At the same time, he has begun having delusions about the relationship between himself and his family and about what he is experiencing and is capable of carrying out while he is incarcerated on death row. In particular, Mr. Ford has come to believe that he has the power to communicate with persons outside prison through various devices such as radios and has the power to know what is happening in the world outside the prison by his own mental and perceptual powers. Because of his exercise of these powers, Mr. Ford has come to believe that his family and numerous other persons are being held hostage in Florida State Prison. As his illness has worsened, Mr. Ford has maintained these and other delusions but has also begun to feel he has the power to resolve the crises which face him. Accordingly, Mr. Ford has indicated that he has taken care of the corruption which caused the hos-

tage crisis and has, in the course of recent months, married ten women upon whom he is relying for financial support.

C. During the course of Mr. Ford's deterioration over the past two years, Mrs. Ford's contact with her son has led her to the conclusion that he is unable to understand and appreciate the reality of his incarceration on death row and his impending execution.

18. Accordingly, Mrs. Ford believes that her son is incapable of protecting his rights as those rights must now be exercised, and she thus asserts his rights upon his behalf as his next friend.

Grounds Upon Which Habeas Corpus Relief Should Be Granted

Introduction

Since Mr. Ford has previously filed a petition for a writ of habeas corpus, the petition now before the Court is a "successive" or subsequent" petition. However, this fact alone does not permit the Court to decline to entertain the merits of the grounds presented. Only if the Court finds in addition (1) that a ground or the grounds raised herein were raised in the first petition and were at that time adjudicated on the merits, and the ends of justice would not be served by reconsideration of such grounds; *or* (2) that although a ground or the grounds raised herein were not raised in the first petition, the failure to raise the grounds in the first petition constituted abuse of the writ, *see Sanders v. United States*, 373 U.S. 1 (1963); *Potts v. Zant*, 638 F.2d 727 (5th Cir. 1981), can the Court decline to entertain the merits of the grounds presented.

Because the "abuse of the writ" doctrine has been so broadly applied in recent cases, *see, e.g., Sullivan v. Wainwright*, 721 F.2d 316 (11th Cir. 1983); *Goode v. Wainwright*, —— F.2d —— (11th Cir. April 4, 1984) (No. 84-3224), it is crucial that the Court carefully analyze Mr. Ford's position that *none* of the three grounds he presents herein can be dismissed under that doctrine

or the related "prior adjudication on the merits" doctrine. For this reason, Mr. Ford has filed a separate memorandum along with the petition in which he fully demonstrates why these doctrines do not apply. As set forth in full in the separate memorandum, the doctrines do not apply to the first ground (¶ 19, *infra*) because that ground was not previously raised; and further, because the facts in support of the ground were not in existence at the time the first petition was filed, the failure to raise the ground cannot be deemed an abuse of the writ. The doctrines do not apply to the second ground (¶ 20, *infra*), because that ground was not previously raised, and because the law in support of the ground did not support the assertion of that ground at the time the first petition was filed. Finally, the doctrines do not apply to the third ground (¶ 21 *infra*), because that ground as well was not previously raised; further, because the statistical evidence necessary to support the ground was not in existence at the time the first petition was filed, the failure to raise the ground cannot be deemed an abuse of the writ.

Accordingly, for these reasons—as fully documented and supported in the separate memorandum directed to the "abuse" issue—the Court cannot decline to entertain the merits upon "abuse of the writ" or related doctrines.

The Grounds for Relief

19. At the present time, Mr. Ford is mentally incompetent and his execution would thus violate the eighth amendment's proscription against cruel and punishment and the fourteenth amendment's guarantee of substantive and procedural due process of law.

A. Mr. Ford is presently severely psychotic. Counsel believes that Mr. Ford is so psychotic that he no longer has the capacity to understand his execution—i.e., the nature and effect of execution and why he is to be executed—or to communicate to counsel any fact heretofore not communicated which would make his execution unjust

or unlawful. While the facts material to the question of Mr. Ford's competency are set forth in detail *infra*, a summary of these facts at the outset is helpful in order to help the Court understand the process of Mr. Ford's deterioration which has led to the instant action.

(1) Mr. Ford's current illness has been the result of a process of deterioration for more than two years. Until late December 1981 or early January, 1982, Mr. Ford seemed to be in relatively good mental health. However, since that time Mr. Ford has gradually developed what has become by now grossly debilitating psychosis. Mr. Ford began having delusions in early 1982. Thereafter, as his delusions took hold, some auditory and olfactory hallucinations began accompanying the delusions. Gradually the delusions took over his entire conscious existence. The delusions centered on his belief that the Ku Klux Klan was holding his family and other people hostage in Florida State Prison in order to drive him to commit suicide. By the summer of 1983 Mr. Ford's delusions seemed to have changed somewhat. He seemed to have gained the power to free the hostages, to fire and prosecute the officers responsible, and to replace the justices of the Florida Supreme Court. At one point he referred to himself as Pope John Paul III. Thereafter, Mr. Ford's mental processes began to make "less sense" to those of us in communication with him. He began speaking in such a disjointed fashion that, while phrases could be understood, no sensible communication could be had. At some point during this time, Mr. Ford began to believe that he had won his case and that the state could no longer execute him. He seemed amused that the state might "try" to execute him anyway. By December of 1983, however, Mr. Ford seemed no longer able to communicate at all by the same words and syntax that inform conventional modes of communication. There has been no apparent improvement in his mental status since December, 1983.

(2) Through much of the time that Mr. Ford has been ill, he has periodically refused to meet with his lawyers. When the current death warrant was signed, we were in the midst of such a period. Mr. Ford had refused to see us since mid-December, 1983. While he still refuses to see us, we have obtained information, recounted *infra*, which confirms that Mr. Ford's mental health is today no better—and is probably worse—than it was when we were last with him on December 19, 1983.

B. The facts concerning Mr. Ford which must be taken into account in connection with the motion *sub judice* come from six sources: testimony in his trial; his written correspondence over the last two-and-one-half years; a series of psychiatric interviews and evaluations of Mr. Ford by Dr. Jamal Amin, from July, 1981 through August, 1982; a psychiatric interview and evaluation of Mr. Ford by Dr. Harold Kaufman on November 3, 1983; an interview with Mr. Ford by his attorney Laurin Wollan and paralegals Gail Rowland and Margaret Vandiver on December 15, 1983; the interview with Mr. Ford on December 19, 1983 by the commission of three psychiatrists appointed by the Governor pursuant to *Fla. Stat* § 922.07; and the facts reported about Mr. Ford's mental state at the present time. The facts presented by these sources are set forth in the pages that follow.

Mr. Ford's Correspondence

C. During Mr. Ford's period of incarceration on death row, he has been a prolific correspondent—with his attorneys, his family, his friends, his newly-developed (sometimes by correspondence only) acquaintances. His letters reveal a very bright, caring, principled person who is concerned not only about the events in his life—pertaining to his case and to the conditions and treatment of prisoners at Florida State Prison—but also about the events in the lives of the people with whom he corresponds and the major events that shape the lives

of people collectively. His letters also reveal, and dramatically document, his gradual decline into the serious mental illness from which he now suffers. Because Mr. Ford has spent so much of his time writing and has written so articulately, his letters thus provide an extraordinary window into his mental and emotional state and how it has changed over recent years. Accordingly, they are a unique source of material facts which show the gradual but unrelenting deterioration of Mr. Ford's mental health, and of equal importance, which show that Mr. Ford's illness is genuine, not merely a contrivance to avoid his fate.

D. Prior to December 5, 1981, Mr. Ford's letters revealed a seemingly healthy, "normal" human being. For example, on August 7, 1981, he wrote to Gail Rowland, a staff member of the Florida Clearinghouse on Criminal Justice (who served as a paralegal on his case and in the course of her work with Mr. Ford became a close and trusted friend), as follows:

> Dear Rowland:
>
> Content in knowing you and members of the Clearinghouse, had a safe trip to and back, from South Carolina. Relieved to know, we are still friends. Well I wasn't sure, after, all I've said, but it was only the truth.
>
> Yea, I did receive your letter explaining you and members of the Clearinghouse, would be in a week of meetings, in South Carolina. You should have gotten, my last letter, showing I understood, you would be busy.
>
> Content in knowing the meetings went well. I can understand your missing your family, happy you're home. Also, and you were able, to be at the beach.
>
> Will be looking forward, to seeing you. I'm still not sure, about some things, especially if I should write, about what happens, inside the Prison Walls. Think

I'm more lazy, than anything else, think a lot of times, how easy this would be, if I had a tape recorder. I still stress, the point. No one, should read anything I write, about the Prison. I'm still not sure, if I should, though. Hope to talk to you, if I feel better about this. I may have started, but I won't promise.

Well you need a car, if you don't have one. Do be sure to inform me, when you think you'll be back at Florida State Prison. I am not unreasonable, even if I seem, so.

Haven't received any word, on the Parole Commission Interview of 31 July 81, from relatives, but will inform you, as soon as I do. My sister had mentioned, talking with Wollan, by phone earlier, in July. I'm sure the interview had them, somewhat, not knowing what to think.

Thanks for sending the Amnesty Newsletter, back. I will most likely write Williamson, sometime soon.

Will truly be content, in seeing this summer end. Hope those days are over, wherein it was near or over 100°.

Know you'll be busy, at home as well as work. Hope you'll be able to visit your family in New York, in December.

You are a good friend, so stay in touch. Will think about writing about some of the things we discussed.

So take care.

Sincerely, Alvin B. Ford.

Appendix I (submitted herewith), Letters, A. Another, longer letter, dated August 31, 1981, to Gail Rowland was quite similar—sharing Mr. Ford's feelings about various events in his life, discussing the stresses and the boredom of life on death row, expressing his concern for

various friends and acquaintances, and mentioning his fondness for Dr. Jamal Amin, who was conducting an ongoing psychiatric evaluation for use in Mr. Ford's clemency and post-clemency proceedings. Appendix I, Letters, B. Again several months later, on December 1, 1981, three weeks after Mr. Ford's death warrant had been signed and less than one week before his scheduled execution, Mr. Ford wrote Gail Rowland a letter typical of all his correspondence to that point—expressing his gratitude for the hard work people were putting into his legal efforts, his special gratitude for Ms. Rowland and her daughter, and his happiness that Ms. Rowland had a good Thanksgiving holiday. Appendix I, Letters, C.

E. On December 5, 1981, however, health and normalcy began to give way. The first sign of Mr. Ford's break with reality appeared: he wrote in a letter to Ms. Rowland on this date that the staff of a radio station in Jacksonville, WJAX-FM (often referred to by Mr. Ford as "95X"), "have been talking to me, the pass few weeks," not by visiting in person or on the telephone, but in their broadcasts.

> Dear Rowland:
>
> Thought I would write about WJAX, and the staff at 95X-FM, who I had informed you, have been talking to me, the pass few weeks.
>
> I wrote and informed them, their names will go in my file, so send Fins Esq, Hill Esq., a copy of this letter. Plus send Hill Esq. a copy of the letters, concerning death watch.
>
> Well a friend Clyde Holmes, use to call 95X (WJAX) and ask Otis Gamble to play different songs for me. This went on for months.
>
> I would tell Holmes, to give Otis Gamble a message (he calls himself, "the Greatest," the name I gave him, but usually Gambini) which would be, a message in a joking manner.

Then Gambini would get on the radio, and tell me, what he would do to me, by his being 6'4", and 230 pounds. So I would send a message I lift 400 pounds, easy. So this is how it started.

Then the guy who does the news, Scott, would get on and talk about 400 pounds. So for whatever, I had sent the message, they would let me know, they got the message. All this was in kidding.

I never wrote the radio station until a few days after the death warrant was signed. This guy Scott got on the radio, and was asking could I talk, "What's the matter with you, you can't talk," so I wrote.

From the time prison officials gave me the radio, Scott has been selling out, so much so. I couldn't let him get the last word in. So Scott and Gambini, has kept me laughing.

The guards know, they talk to me over the radio. Scott gets on the radio 5:30 A.M. in the mornings, and says, "is he up, wake him up," and the guard wakes me up, and I say, "Damn Scott is talking that crazy shit, this early in the morning."

The lady who does the news, Peggy, kids me because I kid her. Then while doing the weather, tell me no good news. She calls Bob Graham, the "gritch" (spell wrong) that stole X-mas. They tell me, all sorts of stories. Funny ones.

Then there's a lady name Destiny. Who takes over where they leave off, she said her name was Gail Adams, the other night.

The people at the radio station has really, made the situation more easier. They told me good luck, before the hearing Friday. Peggy, the newslady, said she hadn't heard anything about 5:00 P.M., asked had I one day I could hear them, turning the pages

of the newspaper, someone would ask, "any good news," the other, "I don't see anything."

They the four people have said, so much over the radio, to me. They told me it was (11) secretaries typing the weekend the after the hearing was denied in Fort Lauderdale, and so many other things I can't even begin to write.

So I thought I would like in the file, they were special people to me. They say, they will be with me, until 8 December 81. So I would like to have this in the file, if ever its read, by others.

Thank you, Alvin B. Ford.

Appendix I, Letters, D.

F. In a letter to Ms. Rowland nearly three months later, February 24, 1982, Mr. Ford again discussed his developing relationship with the staff of WJAX. In the intervening period since the December 5 letter, it is clear that Mr. Ford's delusional relationship with WJAX had become much more complex and more central to his ongoing life. Moreover, this letter introduced what was to become an overriding obsession: Mr. Ford's preoccupation with, and personal battle against the Ku Klux Klan.

Dear Rowland:

The leader of the Jacksonville NAACP was on the noon news, on Channel 4 (of Jacksonville) 23 February 82.

He asked that on one, show up at the Klan rally 25 February 82. The Klan will feel real strange.

On 21 February 82, I sent the radio station the article that was in the February 82 issue of Matchbox (Amnesty International). Also an article on this lady from Ireland, who won the Nobel Peace Prize, five years ago.

Candy Markman of Nashville, Tenn., mailed the articles, or article her father writes sometimes. He lives in St. Petersburg, Florida.

Mailed the article to Big "O" (Otis Gamble). That's what I call him. I saw him on television once. He runs the opinion line. So guess I'll start back writing.

I don't think Jacksonville, is ready to know, I've been writing most of the topics for the opinion line.

All except for three programs, this month. The reason, missed two this week, because I told the staff, at the radio station, I wouldn't be around this week, to hear the people call, and talk of hate, for the Klan, and people because of the races.

Destiny was crying Monday night. Guess Big "O" showed her the picture by Doug Magee, of the Gas Chamber.

I have a plan, in this opinion line, if the station keeps using the ideas which leads to votes, and gun control. But it will take months of the opinion line. . . .

Will be in touch.

Sincerely, Alvin B. Ford.

Appendix I, Letters, E.

G. By February 28, 1982, just four days later, Mr. Ford's delusional system had taken a quantum leap. On February 25, 1982, two events occurred in Jacksonville which took on extraordinary significance for Mr. Ford: the Ku Klux Klan held a rally; and fire destroyed the house and lives of a black family, killing the father and six children and leaving only the mother alive, because she was pushed out a window by her husband to run for help. In a very long letter to "Destiny," one of the staff

members of WJAX, Mr. Ford explained the significance and interrelationship between these two events—i.e., the Klan started the fire—and explained how God had revealed these facts to him. Because this delusion is of central importance to the subsequent development of Mr. Ford's delusional system, and because the way in which Mr. Ford reports having discovered that the Klan started the fire is so revealing of his increasingly psychotic state —in which delusions, loosening of associations and hallucinations are manifest [1]—the letter is reproduced here in substantial part.

> Destiny:
>
> Please read my letter of 24 February 82, again. Then make copies, of both, that letter, and this one.
>
> Then I want Ed Austin, to read the letter of 24 February 82. Also this letter. Make him a copy of both. I'll need him at the end of this letter. I always call him, Ed.
>
> The letter of 24 February 82, was a thought, question, answer, letter in a sense. I will just go over it.

---

[1] *See* American Psychiatric Association, *Diagnostic and Statistical Manual* (Third Edition, 1980), at 182-183 [excerpted in relevant part in Appendix I submitted herewith] [hereafter referred to as *"DSM-III"*]. *See also* the definitions of these terms:

"Delusions" are "false personal belief[s] based upon incorrect inferences about external reality [which are] firmly sustained in spite of what almost everyone else believes and in spite of what constitutes incontrovertible and obvious proof or evidence to the contrary." *DSM-III*, at 356.

"Loosening of associations" is a form of "[t]hinking characterized by speech in which ideas shift from one subject to another that is completely unrelated or only obliquely related without the speaker's showing any awareness that the topics are unconnected." *DSM-III*, at 362.

"Hallucinations" are "sensory perception[s] without external stimulation of the relevant sensory organ." *DSM-III*, at 359.

Now that you have read that letter of 24 February 82.

I didn't get the 25 February 82, newspaper, Florida Times Union. So guess something was in there. Then have the feeling, more people are waiting for this letter, than in the pass.

Even heard Reagan over 95X talking about the light by the plant. That light, is something I can only see it, when he is ready. I'm waiting on it now. Have saw many things, and didn't start understanding until the newscast 4:20 P.M. by Peggy 95X FM, on 25 February 82.

There's times when I write about things, as to when, or what date, they will happen. If I can't see the light from the sun, I'm lost. Then it's not the sun, someone much Stronger. Those who read this letter will see the light I'm talking about, and know, this is the light, I see by, when he wants me to, I have no control, it's only when he wants me to see.

. . . .

I never forget, what has happened this pass week, to ten days.

I was very content in hearing, the leader of the Jacksonville, NAACP (on Channel 4) ask that no form of protest be given to the Klan Rally 25 February 82. (This was aired 23 February 82, on Channel 4 noon).

I wondered how the Klan members would feel, with no one, there to hate. Also was content, some television stations, showed little coverage of the Klan members, up until 25 February 82.

Was more concerned, as to, how the young students and children, would react, to such hate. I learned about love, and people, in my own way, and had the

best teacher. Everyone, will see that teacher, who reads, this letter.

The light, that shines, through the window, to the floor, you'll see it, it's in the light. It's no one, but God. That's how, I see things, in the outside world. It may seem strange, but he, is much powerful, than any of us have ever, conceived, or rather much more powerful, than any man, ever conceived.

He showed me, the past seven days, and I will tell you how. It really frightens me, once I begin to remember.

This all started, when Destiny asked, if I knew her age, 95X, the night of 24 February 82. Then asked how, I knew, there was a living plant, in the room, (at her apartment) with the Bird.

I informed her, the light was shining, on the floor, she must have turned, and saw the light while on the phone, when she called the radio station, 95X, that morning. Guess she didn't know, he was there, in the light. Don't know, the reason, for her calling, but that's why he was there (God). That's how, I saw the plant. She is a special Friend. As all the members of the staff at 95X.

In the 24 February 82, letter, I tried, to explain, to Destiny about the light, without mentioning God, was the light, because he knows, I know. Already.

In my trying to explain, I mentioned a few things. As how sometimes, I can see things, days, sometimes weeks ahead, of time. There's times, when I'm wrong. That's God's, not with me, or rather I'm not with God, because he, is always there.

. . . .

4:20 P.M. 25 February 82, Peggy's first news story was of the Klan rally. But she sound, so frightened,

I'll never forget the cold chill, I got as if she was talking to Death, itself, her voice never has ever sound, so frightening, and chilling.

During the second story on the fire (the man and six children) I saw three black images, standing behind her, in or black images as the outline of someone, in the Klan hood and gown. The chill was so cold, that it frightened me.

After the newscast, I thought of the letter of 24 February 82 and somehow, just hoped, Peggy wasn't afraid of me. I didn't understand what had happened, until later that evening about 6:00 P.M. matter of fact, I didn't understand what had happened, until about 6:00 P.M. 25 February 82 (Friday), and still didn't know, everything, ur til I saw the sunlight, the morning of 27 February 82, with Sandy.

He showed me everything, and left something, so you'll know how great he is. He only let me look in the window once, I wanted to look again, but he said it's there. Soon you'll see what I saw, and know.

I know the Klan members, burned that house.

. . . .

Rather than tell someone, what I was thinking, I wrote 95X, and asked Peggy to let me know, if she, hear the news, on the cause of the fire. The morning of 25 February 82.

Watched the 6:00 P.M. news on Channel 4, then saw the faces of the Klan members, who, burned the house (on pages eleven and twelve). [Mr. Ford is here referring to * * * two newspaper articles, * * *.]

They were Bill Wilkson, the leader, Robert McMullen, and the Klan member, with the reddish brown beard (holding the two signs) with the wood part

in his hand. That's in the 6:00 P.M. Channel 4, newscast, 28 February 82.

I was wondering, who I could inform. But I see now, someone's waiting on this letter.

Peggy made some type of noise, in her throat, while mentioning, the gun law, had pass, as stated in the 28 February 82, paper, and letter of 24 February 82. This made me take a closer look at everything. As far as what I had written, in the letter of 24 February 82, and what had happen.

* * * *

. . . .

I sat down and looked at that picture on page twelve [the picture reported in the *Florida Times Union* edition of February 26, 1982, *supra*], and went over it many times. I saw the man, Robert McMullen, pouring something on the roof of the house on page twelve. The man with the reddish beard, through fire, in the first window on the corner of the house, where the meter is, it's marked (X).

There was a man inside the house, this is why "the little girl, said the house frightened her."

The man pushed the lady out the window, nearest to the meter, so she get help, and she called God. As I did, after seeing, all this. I asked God to help me, with the light, I had saw, by the plant because, the investigators couldn't find the evidence.

Then the sunlight, arrived, in the window, by the meter, I saw something in the ashes, I still don't know the name of it, because seemed, as one corner, was in the ashes, I wanted, to move it, but couldn't touch, it, to get a better look, it looked like this:

[Drawings Omitted in Printing]

The brown picture, is the first one I put on paper, so I wouldn't forget what I saw. This was the only thing, I saw with the light through the window.

I didn't know, what either of the pictures, on page fifteen [the diagrams, *supra*] was, because it looked silver, around the edges, and black engrave, with one edge in the ashes, covered, looked as though.

I looked and looked, this is the only thing that looks close to it. (on page seventeen) [Mr. Ford is referring here to page seventeen of his letter, which contains the picture of the Klan member, *infra.*] Turn the drawing on page fifteen [diagrams, *supra*], see how it fits, there's only one thing missing, the last corner (as in the house on page twelve).

The lady in the newscast, 6:00 P.M., on Channel 4, is the other corner.

The evidence, is in the path, of the light, on the floor mark the path of the light, from the window on the floor.

I only saw in the window once, and would like to see, what the window, showed.

He said, the lady, in the blond or with the blond hair, who was in the Klan outfit, go get her (only) for now.

* * * *

Then let her read the letters, of 24 February 82, ...

Then take her to the house, to see what God left, as his mark. Then give her the money, and make sure, she is safe, and free to go, wherever she wish to go.

She will see the light, also, and she will continue to, until she does the right thing. That will be the only way she can stop his power.

I don't know you, but saw you at the Klan Rally, pretty blonde hair. God, will be talking to you, so don't be afraid. Be still listen, and think, that's how he talks, when you see the light, look at it, spinning, on the floor.

Look at your feet, when you get inside, he will make you remember, standing right at the fourth end of the picture you saw, I saw the light through the same window.

The lady, pushed through the window, called God, as the house was burning, and he answered. I don't know what you'll see inside that house, when you get there.

But don't be afraid, you will see what I saw, through the window, but you'll see the light God only allowed me to look in the window on page twelve once.

Ed Austin, you may know me, I met you in the Fourth Judicial Circuit, Nassau County, Fernandina Beach, in 1980.

You remember, in the case of the young white kid, who killed the convenient store worker. Judge Adams, I know you fear God, this five days pass, I learned, how great he is.

He said, give you a copy of this letter, and get one of the 24 February 82. Then know, he is God, writing this, for me.

He said, go get the lady, in the Klan outfit, and bring her back alone. Her picture is in the Channel 4 newscast 6:00 P.M., 25 February 82. Blonde hair.

Let her read the letters, then take her to the house, and let her, see his mark.

To tell you the truth, I wanted to see it again, but I'm frightened of the glow.

I don't know, what you'll see, but God help you. He also said, to mark the area, whatever it is he wants you to see, also. So be there early, and wait on him, he will come in the window, by the meter, slowly in the light.

Whatever is there, no matter what, they are to look, and mark the light. I saw something, in the ashes, in the light, looks like on page fifteen (the drawing).

He said, to tell you to look at the light, as it comes through the window, then come back, when the lines are marked, from the light on the floor, from the windows.

Then know, she went for his help. Also, no matter, what's there, go get the girl (blond hair, Klan gown) and let her read these letters. Then take her to the house. He will do the rest.

He said, give her the money, and make sure, she is safe, and give her, a little time, to think, after she, see whatever, he left there in the house. Also make sure she is free to go.

God bless the staff at 95X, and those who saw this, work of God.

Sherlock.

["Sherlock" is Mr. Ford's nickname in the prison.]

Appendix I, Letters, F.

H. During the month that followed the writing of this letter, Mr. Ford seemed to return to a relatively healthier state. His loosening of associations and hallucinations, so clearly evident in the February 28 letter, seemed to have subsided. As evidenced in his letters to Gail Rowland of March 8, 9, and 13, 1982 (Appendix I, Letters, G, H, and I), Mr. Ford continued to believe his delusion about the Ku Klux Klan—*e.g.*, "[t]he letters

concerning the Klan has bothered me some what, because I want the Grand-Wizard" (Appendix I, Letter, G)—and his delusion about his ability to interact with the WJAX staff, but he also seemed to be communicating in the "normal" style and about the "normal" subjects he formerly wrote about.

I. Mr. Ford continued to communicate in this fashion until April 17, 1982, when a letter to Ms. Rowland on that date showed some further advance in his delusional systems, accompanied by the injection of paranoia into his delusions as well as the re-emergence of his loosening of associations. In the first half of this letter, Mr. Ford wrote matter of factly and "normally" about Ms. Rowland's family and associates, the decision by the panel of the United States Court of Appeals in his case, and an upcoming meeting with one of his attorneys. Then abruptly, he wrote:

> . . . .
>
> I saw Graham on television, with water in his eyes, talking about that letter I sent the lady D-Miami, with the words, unlined. Wait until you read the letters, Destiny has at WJAX.
>
> . . . .
>
> The people at the radio station, Destiny, has information, on some things that happen, the following day, after I had written her. I haven't been writing for their opinion line, because trying to keep up, with the Ku Klux Klan, has gotten me tired.
>
> Thank you for nice Easter card. I have stop writing about anything, as to when or where, it will happen, because this whole thing, leaves me very tired, and the people at the radio station, keep asking for more, when I haven't rest.
>
> Haven't wrote Candy Markman's father, yet because the talk about war, scares me. So I just stop, writ-

ing anyone, who may seem to ask some strange or unusual question.

I have to see what Destiny has done, with all the letters. Doug Magee [a writer from New York who has published books about death row] is at that radio station saying his name is Dale Taylor. I haven't received a letter, from him, so I'm about ready to stop writing that station.

Well hope to see you soon. Think I'll just rest some. Tell Geoff and Tao [Ms. Rowland's husband and child] hello for me. I don't know much about the book, but whatever, I write, I don't plan on sending to WJAX, until I find out, what happened to the other things I have written so far.

So take care, and hope to see you soon.

Sincerely, Alvin B. Ford.

Appendix I, Letters, J.

J. Over the next three months, Mr. Ford again seemed to have "gotten better," as evidenced in his letters. Appendix I, Letters, K and L. To be sure, his delusion about the Ku Klux Klan remained intact, and he reported devoting much effort to seeing that Bill Wilkinson (the leader of the Klan) would eventually be prosecuted and convicted for the arson-murders in Jacksonville. He also took care to be sure that Ms. Rowland and her colleague, Scharlette Holdman, knew about what he was doing and understood the "evidence" he had against the Klan. And his concern for his "Klan work" was so pervasive that he reported little concern about anything else, even the legal proceedings related to his conviction and sentence:

I have the briefs from the lawyers, Burr III and Fins Esq. I've been so busy I haven't had the chance to read them, but will this weekend. I don't worry too much about the ruling that will be from the 11th

> Circuit, on the rehearing. Have many other things to keep me busy.

Appendix I, Letters, L. However, he also was able to communicate about everyday matters concerned with his and Gail Rowland's friendship, Appendix I, Letters, K, and his manner of writing was more coherent, reflecting another remission of his loosening of associations.

K. By July 8, 1982, Mr. Ford's remission ended. On that date, he wrote Scharlette Holdman (Florida Clearinghouse on Criminal Justice) a letter reporting a significant advance in his delusional system: he had just discovered that Gail Rowland *was* "Destiny," and he wanted to know why she had been trying to fool him for the many months she had been seeing him.

> Dear Holdman:
>
> As soon as, you have time, do reply to this letter. I've been writing WJAX some time now, to an A/K/A Destiny.
>
> Most recently I found out she is Gail Rowland. This is because she mentioned, something, I told her, in prison, at the prison, during a visit.
>
> A while back this Martin, was sending me messages, threatening to kill her. So I asked Angela [newsperson from Channel 4, Jacksonville] to ask Ed Austin to put a wire tap on her phone, and watch her home. This fraud case came, up. The police, was looking for Martin. I wrote Angela and told her he was more than likely at Destiny's. This where, police, picked him up, the following morning.
>
> Gail Rowland, has, been writing from this address. Granda Apartments, 2131 North Meridian Road, Apartment #111, Tallahassee, Florida 32303.
>
> 19 June 82 there was a wedding. I put Gail Rowland's name on the letter, sent it to Channel 4.

> The reason I think she (Destiny) is in fact Gail Rowland, is she mentioned some things, I have told her in prison. Now to the serious part. Destiny has been playing games, with me, for three months. Most recently, threats.
>
> I've been so angry, I had the thought in mind of hurting another prisoner. Seriously, I couldn't believe this was Gail Rowland.
>
> Haven't had a reply, from her, in quite a while. I have a 50-page letter on her. Threats, etc. . . . she can cause me, to get another murder charge.
>
> She always mention, she has been help you. So tell me what you know about her. I don't want to hurt her, in any way, or the efforts in the fight against the death penalty.
>
> She has caused me, a lot of confusion. There was, well, I'll wait on reply. Do be in touch as soon as possible.
>
> Sincerely, Alvin B. Ford.

Appendix I, Letters, M.

L. That Mr. Ford's July 8 letter was a sign that his illness was worsening was powerfully confirmed some two months later, in a letter to Deborah Fins, an attorney who formerly represented him. By the date of this letter to Ms. Fins, September 11, 1982, Mr. Ford's delusional system had become all-pervasive and all-encompassing. Because of his work against the Klan, he believed that he had become the target of a complex scheme of torture ultimately designed to force him to commit suicide. Although this delusion has undergone some change from September, 1982 to the present, this is the central delusion which has governed Mr. Ford's daily existence since its onset in September, 1982. There have been no remissions—from the grip of the delusion, the loosening

of associations, and the hallucinations—since then. Because this delusion has been so dominating, Mr. Ford's entire September 11 letter has been reproduced, for it is the critical stepping stone from the past to the present in Mr. Ford's life.

Dear Fins. Esq.:

Thank you for your letter of 22 July 82, as of this date, I still want my, files closed to Doug Magee, and no one is to have access other than lawyers.

Also I do not in any way, want Dr. Amin, or Gail Rowland, associated with my case in any manner, as of this date.

I'm sorry I haven't replied to your letter, until this date. I have had a number of problems, at Florida State Prison, over the pass three months, with guards, the KKK, and Owl Society or organization.

I really wanted to see you, it's been such a long time, Deborah. I wasn't able to leave the cell, hopefully you got the refusal slips, and the messages, I wrote on them, to you.

If you receive any affidavits concerning what has been going on inside the prison, do hold them, and make sure all persons, attorneys, etc . . . receive copies. Do excuse, my saying you were missing, this was the only way I could get the prisoners interested enough to write, wherein I could get some help.

Dennis Balske of the Southern Poverty Law Center, should be sending copies of letters written prison officials, and lawyers, concerning the problems, I've had here over the pass months, mailed them, to the Poverty Law Center, because of their Klan-Watch. Then asked that they send letters, to or copies, to the lawyers.

My situation needs a solution, as soon as, humanly possible. I have been threatened 24 hours a day, for

the pass three months, by guards and Bill Wilkinson of the KKK. He has been working here, under the name of Officer McKenzie, Q-Wing.

When you do visit again bring a tape which can play six to eight hours. There's so much has happened, until I don't know where to start.

My life is in danger, by these guards and the KKK, and Owl Society, or organization, plus this labor union, you should be receiving, copies of letters, to this effect.

Other than threats, I have been, okay. Have been more less, trying to gather information, and review the situation.

Please call Wollan, and Dennis Balske of the Poverty Law Center, to get a full report. Wollan, Burr III, and Craig Barnard with Vandiver, was at Florida State Prison on 11 September 82.

I've been hounded by Bill Wilkinson and the KKK, 24 hours a day, the guards, in the labor union, and Owl Society.

They put me on DC for quite some time, for no reason. Just got some stamps and Wollan, brought some. Just got some pens and paper to write with.

Things have been the same continuous hounding. They are at my door now and in the pipe alley at the cell, vent.

The story is too long to write, but it's the truth. A lady is being held in the pipe alley on Q-Wing, third floor, behind the cell, I'm in.

I'm told the man holding her name is Crooks, the only Crooks I know of is one who works at WJAX 95X, 4:00 P.M. to 6:00 P.M. Sundays.

While waiting to see, the lawyers 10 September 82, the Counselor, Harrington, said I'll be moved to

R-Wing, the working week of 9/13-17/82. While in the Cage, by the Control Room.

As soon as I got back to Q-Wing, I was told Crooks, is to murder me on R-Wing or S-Wing, and either make it look as a suicide, or murder. This lady has been held in the pipe alley since, well about two months, being raped by guards as well as prisoners. This is the reason, I haven't gotten very much help. Guards are allowing prisoners to rape this lady, to keep things quiet, and no one knows she is in this prison.

I hear her now, asking this man, "Please don't kill me." I have been on Q-Wing since 2 August 82, and hounded every day for 24 hours, by the KKK and guards. Can't even eat, without them at the doorway and cell vent saying they put, "Semen in the food, by having this lady, perform oral sex," this is every day, for the pass three months.

While on S-Wing, guards have tried to ease my door open in the A.M. hours. Luckily, I was not asleep, 3:30 A.M., because this plantigraph was waiting to enter the cell with a knife and hatchet, this is the truth, whole truth, and nothing but the truth, so help me God.

Doug Magee, published a book, and changed the authors sold for $680,000. I wrote that book. Paul Robeson, All American, author Dorothy Butler Gilliam. He nor Destiny said a word about it, but I found out, the plan was to try to run me insane, and make me commit suicide.

This why I don't want Dr. Amin, on my case, and Gail Rowland. No one can get the money from the book unleses, I'm dead. As soon as possible I'll write the whole thing. I had but being threatened by the KKK, in prison, I had to pass the evidence.

I've never told you a lie, and this is the truth. Deborah, I think these guards, have been killing people, and putting the bodies, in these concrete enclosures, used for beds, on Q-Wing. Deborah, this is the truth.

These concrete enclosures are used for beds, about six feet long, four feet wide, and three feet high, just a concrete block. The one inside the cell, I'm housed in was open from the pipe alley I think, and the smell was awful, decomposed bodies.

Do know I've never lied to you. While I was out to see Wollan, Burr III, Craig Barnard, and Vandiver, I was afraid they may try to clean these things out. I don't know what happened, but the lady is still in the pipe alley, and at this very moment someone outside my cell door, with threats, the voice sounds as Bill Wilkinson of the KKK.

Before I moved to Q-Wing to DC, 2 August 82, I was on DC on S-Wing-1-North-17. There was a gun on the floor, that was pointed at me, told guards. No one, did a thing, was a shake down 17 July 82, led by Bill Wilkinson.

Got a UCI-666 (Form) (sent to Dennis Balske of the Southern Poverty Law Center, asked he send all the lawyers copies, notarized) which was written by Bill Wilkinson, which said, one altered ink pen, and 5 bundles of paper.

That five bundles of paper was evidence on the book, mentioned on page five [of this letter], and on the KKK, and the hounding by this Destiny at-WJAK 95X Radio Station. The five bundles of paper was going to Jim Smith, State Attorney General. They were trying to get me, to throw them, away, because guards names were mentioned. I wouldn't throw these papers away, so they gave me a DR, for having

a knife, when do you know of me having a weapon, since being in prison. 17 July 82.

15 July 82, the lady who does ABC radio news, told me not to give those same bundles of paper (letters) to Classification Officer Dan. I gave them to him, after some thought asked for them back. As soon as I did, you need a haircut, another DR (the letters were four brown envelopes to Jim Smith on the KKK, the book, and guards, and hounding by this Destiny).

This lady in the pipe alley said, Sergeant Combs, had a gun to her head telling her, she better never tell, she was beaten and raped, with Officer Adams. In the stairwell of S-Wing I heard them, and told her, she can tell anyone, because they had no business, with her in the pipe alley.

When I said that, they cut off my water to the sink and commode. Orders of Bill Wilkinson, on S-Wing. Then I was given a DR, saying I threatened to kill a guard, by Officer Adams.

So Deborah, I've been on DC, quite a while. They have been trying to kill me. Their plan was to do so on Q-Wing, took everything I owned 2 August 82. Had no stamps, pens, paper or envelopes, until September, although I borrowed a pen and paper. Had no stamps, but found some reusable ones on old envelopes and mailed a letter out.

Didn't get a slip concerning my property until 8 September 82. Had over $25.00 stamps, 400 envelopes, 500-600 sheets of paper, 30 pens. Not sure where my personal property is, but guess I'll find out when they take me off DC. More than likely will have to file suit, under High Risk Management.

These people who have been threaten me, told me, they murdered all my family. Hopefully you can, get

back down here, and bring a full tape, that will play six to eight hours, each day. No haven't heard a word from my relatives.

Channel 4 of Jacksonville has been helping. Keeping the guards from killing me. The evidence, I wrote to Jim Smith, State Attorney General, concerning that book was written over the cell walls of Q-3-West-3, the cell I'm in now. (That evidence on the book, was removed from my cell, from S-Wing in the month of July 82.)

Bill Wilkinson says he has my address book, and is killing everyone in there, by address. So I wouldn't have anyone to help me. Guards wouldn't mail my letters, only beat this lady whenever I tried to write the outside, for help.

So I've had to fight the KKK, guards, and prisoners. Also, because the KKK, and guards, has been using the prisoners against me, as well allowing to rape this lady, being held hostage.

So my life is in danger, and need help. Please send a copy of this letter to the FBI, as soon as possible, and contact, other lawyers.

Please be in touch as soon as possible.

Sincerely, Alvin B. Ford.

cc: CIA-FBI
Directors
Washington, DC.

Appendix I, Letters, N.

M. In Mr. Ford's letters which followed this letter in September, 1982, the same information was presented. But in a letter dated September 12, 1982, to Ed Austin, President Reagan, the United States Attorney General, and the directors of the FBI and CIA, three new aspects

to the delusion emerged. First, Mr. Ford noted that he had been in direct communication with President Reagan about the Klan's crimes in Jacksonville from the very beginning:

> The President of the United States of America, should remember well, this case. He was at Camp David, the night, I was writing those letters, concerning the KKK, and mentioned, the "Light by the Plant." He said in the early A.M. hours, this was a "grace period," over the air, live broadcast. I have Mr. Reagan as my witness, and these members of the CIA, along with the radio tape, of 27 February 82 (A.M. hours) over the world news, in the last four minutes on the hour on the above date.

Appendix I, Letters, O. Second, Mr. Ford indicated that messages had been passed between him and various media representatives "through this book, I've been writing from, the Second College Edition, Webster's New World Dictionary of the American Language, William Collins Publishers, Inc., 2080 West 117th Street, Cleveland, Ohio 44111, Copyright 1979 by William Collins Publishers, Inc." *Id.* Third, Mr. Ford reported that the women who were being tortured and sexually abused in the prison might be his mother, Connie Ford, and Angela Estelle, of Channel 4 in Jacksonville. In another massive letter written in September, on September 26, Mr. Ford implored Deborah Fins and the Attorney General of the United States to undertake legal proceedings to expose what was going on at the prison and to require his transfer to another state prison. For nearly twenty pages in that letter Mr. Ford listed the investigative steps which needed to be undertaken in connection with those proceedings. *See* Appendix I, Letters, P.

N. Just one month thereafter, on October 22, 1982, Mr. Ford began to report yet another new development in his delusion—one that, over the course of the next year and beyond would become the most significant element in

his world of delusions: the taking of hostages by the persons who were already tormenting him at Florida State Prison. In a letter to counsel, Mr. Ford reported,

> The same thing has been going on daily, since I saw you. I found out more, this Gail Rowland, along with Dr. Amin, is holding my sister, Gwendolyn Louise Ford Shaw Williams, and Connie Ford (mother) hostage in this prison.
>
> Appendix I, Letters, Q.

O. Less than two months later, on December 5, 1982, Mr. Ford's belief that members of his family were being held hostage in the prison had solidified. Moreover, during this time, he had come to believe that an increasing number of hostages—to this point all family members—were being held. When he would receive mail from these relatives, he would not at all be shaken from his belief that the relatives were nonetheless being held hostage. Indeed, because of the loosening of associations in connection with his psychosis, the logic governing his world had little to do with the logic governing the rest of the world. On December 5, he wrote,

> Dear Grandmother,
>
> I received your letter and card. I haven't written because of a number of reasons. I hope you will be well, feeling okay when this letter, reaches your hand. I have been okay. But I want to tell you don't, ever be afraid, of my dying, because this will happen one day.
>
> You mentioned your being 73 years old, well don't let anyone threaten you into doing anything, at all. If anyone can, hurt a 73-year woman, they have to be really sick, so try to understand, and just believe in God, and ask him to forgive those, that do you wrong.

I know you are inside, this prison, behind my cell. I have been wondering, how you got in this prison, also with mother, Gwen, and the other relatives.

I have been more surprised, in your not telling me, from the first day you were, brought in this prison.

God, put your trust in God, don't write, and tell me lies. This is the reason, I had such a time, finding out about all the family, from this prison cell. So don't do anything, against your will, you are not to be held hostage, in this prison, by these people. God, is the answer, so take care of yourself as well as humanly possible.

Hopefully your knee is better. Also you were able to have the X-ray. Tell Uncle Henry hello, also he must be held hostage here, also. Tell him, he should write.

I won't be having any visits, until all my relatives, are safely out of this prison, one way or the other. I know now, about the relatives, as well as the outside world, so trust in God.

I've given these people, every chance, possible, to let you, and the relatives to go, but looks as though, they refuse. So if they hurt anyone, the crimes, will surely, have a lasting effect.

Thank you for the stamps and God bless you, and keep you safe. Trust in no one, but God.

Sincerely, Alvin B. Ford A/K/A Sherlock.

Appendix I, Letters, R.

P. As time wore on in 1983, Mr. Ford's delusional system remained very much the same. Gradually, however, more people became hostages, and as more people became hostages, Mr. Ford's role as the only one who

could help the hostages, began to develop. As this role grew, Mr. Ford became increasingly angry—righteously angry—and increasingly grandiose. On March 28, 1983, for example, Gail Rowland received the following angry barrage:

> Dear Rowland:
>
> I received your 16 March 83, 21 March 83, letter. Sorry in my delay, in this reply. Since you have been in the pipe alley, behind my cell, with my lawyers, family, and prison officials, since July 82, even death row inmates, I decided, I would not write, until now.
>
> Also I note all the people, who was working at 95X, WJAX, are also inside the pipe alley, behind my cell.
>
> You know the story too well. I know very well, you have told quite a few lies on my family and me, since the first day you had my relatives, brought to the prison, back in July 82. Whatever reason, you brought them here for, possibly, you will explain it, later, in a letter or in person.
>
> As far as your leaving this prison, going to Tallahassee, to write for that newspaper, I won't comment on that point, as of yet.
>
> You know, all too well, my problems, and the problems, of those people you have told lies on. Also you know or have known, full well, the attitudes of prison officials, since your first visit here in 1981 when that death warrant was signed.
>
> Also I want an explanation, as to why you have my relatives, lawyers, etc . . . here. Then the reason, all these death row prisoners, are out their cells, bothering my family and lawyers.

Then about the book, I was writing, why didn't you, tell me, your name, was the Destiny of 95X, WJAX.

Also why was the book given a different title and author, and why didn't you send me, a copy of my own book. Then why was it put in a will.

Then the reason all the people are here from 95X, WJAX, also Doug Magee, who I sent, to New York, to come to Florida, to write the book. Dale, of 95X, also, why wouldn't he, tell me his name.

The book is written, now 18 August 82. Destiny is dead. Why was this in the newspaper. Who should I write at WJAX 95X about all my material, since Destiny is dead. Also since Dale, Doug Magee, who never told me, his name.

Guess all that's lost, and Destiny is dead. The book sold for $680,000, and was put in a will to Gilbert. I know the whole story.

I told you long ago, I would give you that book. Where is it, you had it, all the letters. What are you, pulling on me, and my family.

First I want you to know, I am a man, possibly, the best you ever knew. You will not treat me as some dumb-ass nigger.

You had no friends, you don't even know, where my book is. Never gave me one penny, since I've known you. Not sent one package, or anything.

Then you treat my family like they are no one, in front of people, who could give less than, a damn about you. When there is no money, no drugs, see where they go.

I will write any lady, I want, this jack-off shit, you can take to someone else. This talk about Leper, etc. . . . want you to understand. I can call any

woman, and I demand respect. If you want someone, else, go ahead.

Greatest man on this earth or what. There's quite a few things I have to say. First I've joined the Ku Klux Klan, to get my family out of this prison. Because looks as you won't stop your lies.

The whole while, since July 82, I've been trying to get my family out of here, you have been trying to keep them here, why. Then my lawyers.

The crime watch on Channel 4, what happened to all those letters. Was there ever any money, from the letter. No, I don't guess, you never told me, if I was ever right on the crime watch.

Since July 82, I've sent teletypes, as you know. The talk has been on my case on appeal. Now that I've dismiss, my case, there's nothing to talk about.

My family know, nothing of the Ku Klux Klan, why do you have them talking this foolishness, scaring them, with these guards. Whatever lies, you told get them straighten out.

Now all these punks, on death row, you have out these cells. I'm trying my best not to hurt anyone, all of them are punks.

This asking the guard for a cigarette, shit. Trying to keep me, from purchasing things from the store is some shit. Who is guard Ortagus is he Scott of 95X, is Willis, "CC", and what's "Steve Fox." I hear all their voices, but neither has come, out and gave me their name.

You know, I've been on DC, since July 82, and all these DR's these guards have written, even those on the Disciplinary Committee.

You know, very well your lies have hurt, my family. I don't know, how many have been told, by others, but it's pass time, you stopped lying.

So I joined the Ku Klux Klan. Now what there's no money. I need some. Have you been telling people, I have money.

The lawyer will be years, getting the book back. Well what now, since I joined the Ku Klux Klan.

I read some on Bill Wilkinson, he no damn fool. From what I've read he knows of business, and is not no small-minded person. Even though these people, who are bothering my family treat both him and me like, damn fools. And I'm tired of it.

This shit, streak all night, is a bunch of shit, these guards don't know a damn thing, and keep bothering my family. I'm tired of it.

Scott, knows the messages, and I damn sure will not let, any these punks, snitches, know what he has told me. Because now, is the time to move.

These guards and inmates, don't know a damn thing, and I'm tired of this shit from these bastards, bothering my family.

This is not for them to know, and they won't know. These motherfuckers are going, to get from behind my damn cell, and my family is going home.

I'm tired of these petty-minded bastards, these inmates, it's more than enough to try to save their lives.

I have too much work to do, than this bullshit, you're throwing at me. I expect anything I want or need.

Also to talk to each person from 95X, later. I have many people, I need to contact, you know all, my problems, so won't discuss them.

Will have you contact some, missing property, DC, lawyers, family, visits, schedule, them all, packages, stamps, etc. . . .

Be sure to write.

Sincerely, Alvin B. Ford.

Appendix I, Letters, S. And only five days later, on April 2, 1983, Scharlette Holdman received a letter, in which Mr. Ford recounted the growing magnitude of what he, by then, was referring to as "the hostage crisis," and the critical, world-historical importance of his role in trying to resolve the crisis:

Dear Holdman:

I've heard your voice in the prison in Q-Wing, since August 82, when I was housed on Q-3-W-3, and Holly Morris, even Margaret Vandiver, Professor Wollan, Gail Rowland, Deborah Gianoulis, Tom Wills, Julian Bond, Rev. Jessie Jackson, Senator Edward Kennedy, all my family members, Dr. Amin, Susan Cary, Esq., Richard Burr, III, John Middleton, Esq., William Sheppard, Dr. Gwendolyn Tucker, PBS Channel 7, Honorable Arnette Girardeau, Honorable Haben, just to name a few of the names.

I've written many people, from the Superintendent of Florida State Prison, to the former Superintendents, prison inspectors, Wainwright, the Attorney General, Joy Shearer, the Assistant Attorney General, United States Attorney General, FBI Director, even President of the United States, Southern Poverty Law Center, and many others.

All concerning my family being held, hostage inside the prison walls, at Florida State Prison, by the Ku Klux Klan.

You know, all too well about this, and these mind readers. I was very disappointed you didn't or

couldn't do anything in December, other than join the Ku Klux Klan, along with others, who were held hostage. It's been about 263 days, my family has been here. I understand you, Rowland, Fins, Esq., Carey, Hill, Esq., are ladies, Morris, Tucker, M.D., Gianoulis, Jefferson, Silberstein, are women, which makes, this much tougher, along with others.

I went ahead and joined the Ku Klux Klan, to save the lives of my family. This man holding them hostage, is the one in the crime watch of 26 February 83, you haven't saw those letters.

So far the government hasn't done a thing. The lawyers won't say, one word, other than, behind my cell in the pipe alley Q-2-W-5.

I would guess the whole world knows about this, crisis, because it's been on radio, for months now. I'm okay. Just trying to get my family out this prison. Thought Gail had gone crazy, bothering my family, lawyers, with these people, and prison guards.

I've written every prison official, in Tallahassee, and not one thing has been done. Even the governor and Jim Smith.

Stamps and paper, running very low, the problems with legal packages regular packages, pass X-mas packages, items from the store (prison), television, radio, newspapers, magazines, etc . . . is the same.

Also DC, Disciplinary Confinement, but as well as ever. Schedule an interview, whenever you can, "Reaching out," "Amnesty International," asked if I had written the Clearinghouse, just decided to do so. Tell the staff, hello and everyone else. Have written quite a few people the pass time. I try to work on my death case, in which, I'm finding out some interesting, facts. Just learned.

Very difficult, to show a positive outlook, on the capital punishment, situation. With the death row inmates, committing crimes, in prison, testifying to the public, destroying that image, I've tried to maintain, in showing, the state should not kill, these inmates, on death row.

For the first time, we have the lawmakers, take a look at death row, and look at what we get. Rape, attempted extortion, assault, among other crimes, which will make it that much difficult, for these stays of execution.

God knows, I've tried my level, best, to show, lawmakers, they shouldn't kill me. Then try to protect the others, by giving the State of Florida, my life, to show the world, how wrong this death penalty is.

God has blessed me, in this crisis, to have known, some great people. I would not, otherwise, have known. Pray God they will remain, in our cause.

People are real strange, even though who work at this prison. As you can see, I never lied, to you, or Middleton, Hill, Esq., Fins, Esq., or Rowland.

All I can do now, is pray God, everyone will make it out of this crisis safe. Don't ever worry about me, my God is too strong.

Do give my regards to everyone, I'll just wait around, and see what happens, this is all I can do, at this point.

Write as many people as possible, about this crisis, my God has brought help, in attention, in our cause, in fighting capital punishment.

Content in knowing, my name will be, left in some respect, of the shame, I've cause others, including my family, in my being on death row.

Have very little paper, but will try to write more often. God bless you, and the staff of the FCJ, give everyone my regards, including Rowland.

Sincerely, Alvin B. Ford.

Appendix I, Letters, T.

Q. Gradually, in these days and weeks that followed these letters, anger gave way to grandiosity. For example, less than one month after Mr. Ford wrote Ms. Holdman, Mr. Ford wrote an attorney in Miami, Randall Berg,

Dear Mr. Berg:

I was given your name as a source to contact concerning the hostage crisis, by Beryl N. Jones of the ACLU Washington, DC.

I'm sure you have information on the hostage crisis, at Florida State Prison, this is day 287, the Ford family, lawyers, news reporters, senators, Senator Kennedy and many other leaders.

This crisis has to end, it is causing the racial unrest in your city, namely Liberty City. To curve the crime rate, we will need your help.

Please do not disregard this letter. Your national political leaders, are here inside the walls, of Florida State Prison.

Please brief yourself, by contacting CBS Channel 4, Eyewitness News, WJXT, Jacksonville, Florida. Also Jerri Hamilton, ABC Radio News, Dave Barret, Rita and staff. Also President Reagan.

You will have to bring someone, with you a lawyer, call CBS Channel 4 WJXT.

Do not disregard this letter, you will have to schedule an interview with Alvin Bernard Ford No. 044414.

This is day 287. Do reply by United States mail.

Sincerely, Alvin Bernard Ford A/K/A Sherlock.

cc: U.S. Attorney General
President Reagan

Appendix I, Letters, U. As this letter made clear, the hostage crisis was still growing worse by the end of April, 1983. Moreover, the hostages by then included "senators, Senator Kennedy, and many other leaders," and the crisis was of such global importance that it was shaping the events of history. Indeed by May 8, 1983, the list of hostages included some 135 people, many of whom were nationally-known public figures. *See* Appendix I, Letters, V.

R. As Mr. Ford's delusions became increasingly grandiose, a new element entered the delusions: Mr. Ford felt that he was becoming powerful enough that he himself could end the crisis and force the release of the hostages and thereafter, punish those responsible. The development of this element was apparent in a letter to Attorney General Jim Smith on May 10, 1983.

Dear Mr. Smith:

I know the Department of Corrections is well aware of this hostage crisis, as well as your offices. We have spoken over the FCC in November at the FSU football game (1982) concerning this crisis. You were with Joy Shearer and Governor Graham, some six months ago.

This is day 317, my family and lawyers have been held hostage. The Department of Corrections has endangered the lives of my family, lawyers, and news reporters, from the institution level to the state level.

Please schedule an interview with Alvin B. Ford, Florida State Prison No. 044414. Report all findings to President Reagan, and the United States Attorney

General and Ed Austin, District Attorney, Jacksonville, Florida.

. . . .

As you know, Gwendolyn Louise Ford Shaw Williams RN had a baby inside the prison walls in these pipe alleys. The baby's at the clinic. Also my sister-in-law, Elsa Marie Perkins Ford (United States Army) had a baby while living in these pipe alleys. Thank God they were pregnant before being kidnapped.

. . . .

I have fired a number of officials at the institutional level and state level, with the final approval, from the Governor, and President of the United States. Also your offices.

There will be a number of lawsuits, criminal charges, all listed on the Federal Communication Commission. Also there will be testimony before a Presidential Subcommittee, on this hostage crisis.

Also please note, I write crime watch on CBS Channel 4, Eyewitness News. Please note the crimewatch of 26 February 82. I wrote these letters on these murders for President Reagan, he called a "grace period," will please try under these same persons have, my family, lawyer, reporters and our country's leaders hostage, inside Florida State Prison, Q-Wing, in these pipe alleys.

I'm not sure, how many persons, are inside these pipe alleys, through the prison, but I think there, is others, on other wings, although, I'm not sure, because I'm inside the cell.

I have request prison officials to call the FBI. Hopefully we know (government) how many persons, have been taken hostage. Some have been here since August of last year.

I have been in solitary confinement, since July 82. The President of the United States, Mr. Reagan and the United States Attorney General, know everything about this case.

Each person at the institutional level know, full well, the rules of DOC, being employed by the State of Florida. I have fired everyone, I've written, the final approval, will be from the President of the United States, Mr. Reagan, and the United States Attorney General, at DOC both the institution level and state level.

. . . .

Sincerely, Alvin B. Ford A/K/A Sherlock

cc: U.S. Attorney General
President Reagan

Appendix I, Letters, W. As this sense of his own power grew, Mr. Ford summoned national and international leaders to Florida State Prison "to help end this hostage crisis." For example, on May 19, 1983, Mr. Ford wrote Justice Sandra Day O'Connor as follows:

Dear Madam Justice O'Connor:

I have been waiting on your reply, to my pass correspondence. Please give all Justices a copy of my 11 March 83, letter and 23 April 83 letter.

Please each Justice follow, the directions of this letter, Steward, Blackman, Powell, Stevens, Marshall, Brennan, Burger, White, Rehnquist.

Each will have to travel to Jacksonville, Florida. The mayor of Jacksonville, will meet each at the airport, with CBS, ABC, NBC television stations.

All this nation's leaders, have assembled in Jacksonville, Florida. CBS Channel 4 Eyewitness News, will bring you. We need you to help end this hostage crisis. Also contact ABC radio news.

Then each of the following, Senator John Glenn, Walter Mondale, Senator Gary Hart, Senator Ernest Hollings, Senator Cranston, President Reagan, Senator Edward Kennedy, Julian Bond, Rev. Jesse Jackson, Reubin Askew, Benjamin Hooks NAACP, Ted Koppel ABC Nightline.

There are kings and queens, Prime Minister Margaret Thatcher, many of our nations leaders, each Justice. Please reply by United States mail.

Sincerely, Alvin B. Ford A/K/A Sherlock

cc: U.S. Attorney General
President Reagan

Appendix I, Letters, X. *See also* Appendix I, Letters, Y (similar letter to Judge Joseph W. Hatchett, United States Court of Appeals for the Eleventh Circuit).

S. By July 27, 1983, the hostage crisis seemed to be nearly over. Mr. Ford wrote Gail Rowland on that date, reporting much success in resolving the crisis. Significantly, Mr. Ford's view of his own power and national/international esteem was also continuing to grow. Mr. Ford began to refer to himself as "Pope John Paul, III." In this "resolution phase" of the hostage crisis, Mr. Ford for the first time was also beginning to allow himself to think about other matters—some of which were clearly delusional and some of which were not.

Dear Rowland:

I am replying to your 12 May 83 letter on the above date. Thank you for the legal supplies, I did, in fact, receive them. Sorry I didn't write. Since you have been standing outside my door, I pass, the writing.

I have been in the need for legal supplies, for months. You know, very well of the problems you have created. This hostage crisis is in day 377.

I've written Counselor Harrington for 1061 forms for legal supplies, and he refuses to send them. So he is fired and under arrest, as the others.

This investigation has been very successful, and to the exact point of my pass letters. It's unfortunate so many, prison personnel will be cast in prison.

Thankfully the CIA/FBI was in fact able to investigate UCI, the Attorney General's Office, all level of state and federal court. The Florida State Supreme Court, I've appointed new Justices, I appointed nine.

Especially UCI's investigation of the Fort case, of the pass 60 minutes, we even have the staff of UCI thinking with all intentions, they are holding my family hostage, for extortion.

Thank God they did the things they, because no human being will ever forget, the shame and mental suffering. Each their arrest, excuse, will seek their arrest.

The questions I asked you about my family you state, "You can't answer," well explain, "Why you can't answer." How could could you be confused, about what's going on in the prison. I am still on DC, this is the 352 day, I have been in the need for many things, but passed. I'll survive this crisis.

Do you know Patti Reagan? What kind of wife do you think she will make. Thinking about asking her to marry me. You may see it in the newspaper, magazines, on the news each day. Be sure to look at the gifts I'm leaving, daily at the White House, 100 each day, for 100 days.

Hopefully she will say "yes," send her a teletype, for me.

I need the 1983-1984 football schedule, college and pro. Also I need you to get a weekly copy of "Doc's

Football Sports Journal," send it in the mail. Use regular mail. Each week.

Then a copy of point wise, and the weekly newspaper column, on college and pro lines. Point spreads. Also gold sheet. This will be in regular mail. This is too important, for you not to fill this request.

Do be in touch.

Sincerely, Alvin B. Ford A/K/A Sherlock, Pope John Paul, III

Appendix I, Leters, Z.

T. In the last letter which is available from Mr. Ford, dated November 28, 1983, the hostage crisis appeared to have been resolved and was referred to only in passing. Mr. Ford was still grandiose, referring with irritation to his "aides'" failure to review his letter, but his delusional system seemed to have changed significantly in content. For example, he seemed to have picked up ten wives in recent months. Morover, his form of communication was becoming quite esoteric and incoherent, as commonly occurs in severely psychotic individuals.[2]

Dear Mother,

Its been a while, since I wrote, but there was no need, with this government, or rather this state, having so many problems.

Couldn't imagine this state, and the U.S. Government could be so, corrupt. Also the other countries of this, universe. Excuse the above mistakes, rushed and making notes for the service. If my aides, were at

---

[2] *See DSM-III, supra,* at 183: "Where loosening of associations is severe, incoherence may occur, that is, speech may become incomprehensible. There may be poverty of content of speech, in which speech is adequate in amount but conveys little information because it is vague, overly abstract or overly concrete, repetitive, or stereotyped."

hand, the mistakes would have been cleared. So overlook them.

Expect some lawsuits about this letter so, to all, concerned, be well informed.

If you can send some money and stamps, say whatever, you can, I have asked Wife 1, Britian, she said $400.00, Wife 2 $500.00, Sandra Wife 3 said $1.00, Wife 4 said $300.00, Wife 5 $600.00, Wife 6 said $200.00, Wife 7 $100.00, Wife 8 (no reply) Wife 9 said (it's a damn insult) Wife 10 said, (No comment).

Also send some stamps, they're 30 cents so, listen you take care. Laugh God won, Daniel won, page 7 one 2 one, 6 one fort note D won, right one wrong one, wrong one right one. D one 3 one ½ one, years one.

Can't imagine people can try, what they have. Need anything. No never, as long as my family and wifes are safe.

Rushed so the letter, shall be review by reporters, mistakes? Note private. Aides tapes, etc. . . . Take care.

Love you, Sherlock.

Appendix I, Letters, AA.

The Interviews By Dr. Amin

U. Counsel for Mr. Ford initially arranged for Dr. Jamal A. Amin, a psychiatrist from Tallahassee, to evaluate Mr. Ford in July, 1981, in connection with pending clemency proceedings. Even after clemency had been denied, counsel asked Dr. Amin to continue seeing Mr. Ford, for therapeutic purposes, because of the deterioration of Mr. Ford's mental health which began in December, 1981. Dr. Amin continued to see Mr. Ford until August, 1982. At that point Mr. Ford came to believe

that Dr. Amin was conspiring against him, in concert with Gail Rowland and the Ku Klux Klan, and would no longer see Dr. Amin. On the basis of his four "in-person evaluations" of Mr. Ford over this fourteen-month period, together with his review of Mr. Ford's letters, a taped conversation between Mr. Ford and his attorneys, reports of various persons who had the opportunity to observe Mr. Ford's behavior directly, and Mr. Ford's prison medical records, Dr. Amin reported the following "SIGNIFICANT FINDINGS RELATED TO MENTAL STATUS":[3]

> (1) During the last psychiatric evaluation—the examiner was impressed with the feelings of "emotional distance" and an inability to establish a previously on-going empathic rapport.
>
> (2) Affect and moods are no longer appropriate or adequate to Mr. Ford's present situation indicating some disturbance in the regulation of his affect or emotions.
>
> (3) The content of Mr. Ford's speech increasingly leans toward the symbolic, the esoteric, and the abstract.
>
> (4) Episodes of the abrupt blocking of the stream of thought when Mr. Ford ceases to speak in the middle of a sentence.
>
> (5) Mr. Ford has difficulty in organizing his thoughts by the usual rules of universal logic and reality. His associations are loose, his attention span is diminished, and he appears unable to prevent the intrusion of irrelevant material into his thought processes. Also, he has difficulty in maintaining appropriate levels of abstractness as he accentuates obscure features while ignoring central issues. This decrease in his

---

[3] These findings are excerpted from Dr. Amin's report of June 9, 1983, a copy of which is included in Appendix I.

abstract attitude has been accompanied by an increase in his concrete thinking.

(6) Mr. Ford is unable to differentiate fantasy from reality and his fantasies become part of the basis for his delusions. He relates fantasies which indicate that he feels his thoughts are being controlled or influenced by "outside forces" such as a female disk jockey in Jacksonville, Florida.

(7) Mr. Ford has developed complex, yet logical paranoid and delusional systems usually after the false interpretation of some actual occurrence. His paranoia and delusional thinking have centered around "the Ku Klux Klan", nonexistent love affairs with any female showing interest in his predicament, and secret messages from the radio, television, and books.

(8) There are convincing and consistent indications that Mr. Ford suffers from auditory and visual hallucinations. He has consistently maintained that he sees and hears incidents on his cell block involving his mother's murder; an unidentified inmate threatening to kill him with a gun, knife, or cleaver; and an unidentified woman repeatedly being beaten and raped. Reality testing does nothing to shake Mr. Ford's faith in his hallucinations which were first reported approximately twenty months ago. Prison guards and other Death Row Inmates have reported episodes of Mr. Ford speaking out loud and angrily to seemingly nonexistent persons.

(9) There is strong evidence of suicidal ideation both past and present.

(10) Florida State Prison Medical Records indicate that Mr. Ford has been treated for "Peptic Ulcer Disease" since 1978 and that there was one instance of treatment for an "Agitated Depression" in 1982.

His medical records also reflect numerous stress related somatic complaints such as chest pains, joint pains, and skin reactions.

(11) There is a documented history of severe drug abuse of substances such as Cocaine, LSD, Alcohol, and Amphetamines.

(12) Mr. Ford appears to have very little insight into the fact that he has any emotional problems and goes to great lengths to deny mental illness.

The Interview and Evaluation by Dr. Kaufman

V. In January, 1983, counsel for Mr. Ford asked Dr. Harold Kaufman, of Washington, D.C., to consult with us concerning Mr. Ford's progressively deteriorating mental health. There were three reasons for the consult at that point in time. First, Mr. Ford was beginning to say with some frequency that he wanted to dismiss his appeals and be executed. Because counsel believed that his desire to do this was the product of his mental illness, counsel did not believe he was competent to make such a decision. However, expert opinion was needed to support these views in the event that Mr. Ford insisted on pursuing this course. Second, because by that time, Dr. Amin was perceived by Mr. Ford as a co-conspirator against him, and for that reason, Mr. Ford would not see Dr. Amin, counsel decided that a psychiatrist other than Dr. Amin must be engaged. And third, Dr. Kaufman is highly respected in forensic psychiatry and came highly recommended. *See* Dr. Kaufman's curriculum vitae, included in the Appendix I.

W. Even though Dr. Kaufman was available to evaluate Mr. Ford in January, 1983, he was not able to do so then, or for a number of months thereafter, because Mr. Ford would not agree to see him. Indeed, between January and October, 1983, Mr. Ford refused to see nearly everyone who tried to see him—counsel, family members,

and friends. By mid-October, however, Mr. Ford again seemed willing to see whoever wished to see him, and at this time, agreed to see Mr. Kaufman. By the time Dr. Kaufman conducted his in-person interview with Mr. Ford, therefore, he had known about Mr. Ford for ten months and during that time, had reviewed much of Mr. Ford's correspondence and had listened to approximately three hours of taped interviews between Mr. Ford and counsel. Accordingly, Dr. Kaufman approached the interview with a good deal of knowledge about Mr. Ford.

X. Dr. Kaufman interviewed Mr. Ford for three hours on November 3, 1983, and reported the content of the interview as follows:

> Mr. Alvin Ford entered the interview room in apparent high spirits and bantered for about fifteen minutes with you [Richard Burr] and Professor Wollan. He generally ignored me and my occasional questions. It should be noted that your and Professor Wollan's presence was deemed necessary by me to allow the interview to progress at all because of Mr. Ford's previous (and I understand subsequent) extreme reluctance to be interviewed. I also suggested your presence in order to set him more at ease so that he would be more inclin[ed] to be trustful, open and relaxed with me, whom he had never before met.
>
> After about fifteen minutes of questioning by him and answers by the two of you he turned to me and said, "You a good guy? You OK?" I replied that I thought I was "OK."
>
> Up to this point his questions had been disjointed, and had ranged from personal details ("food's OK—how you eat' ") to delusional questions ("When's CBS comin' in here."). But after 15 minutes the incoherence of his mental associations and the almost totally delusional nature of anything to do with his case emerged as his facade crumbled. One thought

led to another with no seeming relation to the previous one with such rapidity that I have come to the conclusion that there is no reasonable possibility that Mr. Ford was dissembling, malingering or otherwise putting on a performance to induce me to believe him to be psychotic or incompetent to be executed.

It is unfortunate that no tape, especially a videotape, exists to preserve for concerned observers the obvious fact that he was not "acting" for my benefit —or for his own. I think the best way to convey the spontaneous and psychotic nature of his ramblings is to simply record them (see below). These are not selected passages, but a stream of consciousness, either spontaneously rendered or spoken in response to a previous question. It is to be noted that there was very little animation or feeling in Mr. Ford's voice as he spoke, only a kind of "flatness" or lack of intensity of affect.

Mr. Ford **: The guard stands outside my cell and reads my mind. Then he puts it on tape and sends it to the Reagans and CBS . . . I know there is some sort of death penalty, but I'm free to go whenever I want because it would be illegal and the executioner would be executed . . . CBS is trying to do a movie about my case . . . I know the KKK and news reporters all disrupting me and CBS knows it. Just call CBS crime watch . . . there are all kinds of people in pipe alley (an area behind Mr. Ford's cell) bothering me—Sinatra, Hugh Heffner, people from the dog show, Richard Burr, my sisters and brothers trying to sign the death warrants so they don't keep bothering me . . . I never see them, I only hear them especially at night. (Note that Mr. Ford denies *seeing* these people in his delusions. This suggest that he is honestly reporting what his mental

** Comments in parentheses are my own.

processes are.) I won't be executed because of no crime . . . maybe because I'm a smart ass . . . my family's back there (in pipe alley) . . . you can't evaluate me. I did a study in the army . . . alot of masturbation . . . I lost alot of money on the stock market. They're back there investigating my case. Then this guy motions with his finger like when I pulled the trigger. Come on back you'll see what they're up to—Reagan's back there too. Me and Gail bought the prison and I have to sell it back. State and federal prisons. We changed all the other countries and because we've got a pretty good group back there I'm completely harmless. That's how Jimmy Hoffa got it. My case is gonna save me.

At this point I should comment that none of this "idea salad" is out of context. Indeed there is no apparent context for these ramblings, disorganized delusional bits of ideational material.

I asked, "Are you going to be executed?" Mr. Ford replied, "I can't be executed because of the landmark case. I won. Ford v. State will prevent executions all over."

Dr. Kaufman (Q): Are you on death row?

Mr. Ford (A): Yes.

Q Does that mean that the State intends to execute you?

A No.

Q Why not?

A Because Ford v. State prevents it. They tried to get me with the FCC tape but when the KKK came in it was up to CBS and the Governor. These prisoners are rooming back there raping everybody. I told the Governor to sign the death warrants so they stop bothering me.

Appendix I, Kaufman Report, at 1-3.

Y. On the basis of his interview with Mr. Ford and his familiarity with Mr. Ford's history over the previous two years, Dr. Kaufman concluded that Mr. Ford

> is suffering from schizophrenia, undifferentiated type, acute and chronic. The delusional material, the free-floating and disorganized ideational and verbal productivity, and his flatness of affect are the highlights of the signs leading to this diagnosis of psychosis. The possibility that he could be lying or malingering is indeed remote in my professional opinion.

Appendix I, Kaufman Report, at 3.

Z. Further, in response to counsel's request to assess Mr. Ford's competency to be executed in light of his opinion that Mr. Ford suffers from schizophrenia, *Dr. Kaufman concluded that Mr. Ford was incompetent*:

> You have asked me to relate Mr. Ford's phychiatric condition to several standards which might be used to determine his competence to be executed. It is my conclusion, using the Florida Statutory standard you have supplied me with, that because of his psychiatric illness, while he *does* understand the nature of the death penalty, he lacks the mental capacity to understand the reasons why it is being imposed on him. His ability to reason is occluded, disorganized and confused when thinking about his possible execution. He can make no connection between the homicide he committed and the death penalty. Even when I pointed this connection out to him he laughed derisively at me. He sincerely believes that he is not going to be executed because he owns the prisons, could send mind waves to the Governor and control him, President Reagan's interference in the execution process, etc.

> Moreover, it is my conclusion that the disorganized state of his thinking is sufficiently severe to prevent Mr. Ford from being executed under the *Solesbee v. Balkcom* standard of Justice Frankfurter which you forwarded to me. In particular, Mr. Ford's "defects of facilities" prevent him from being capable of understanding "the purpose of his punishment."
>
> In summary, it is therefore my professional opinion, based on my interview with Mr. Alvin Ford, that he is suffering from schizophrenia, undifferentiated type, acute and chronic, which is of such severity that he cannot sufficiently appreciate or understand either the reasons "why the death penalty was imposed on him" or "the purpose" of this punishment. It is therefore my opinion that Mr. Ford is incompetent to be executed.

Appendix I, Kaufman Report, at 3-4.

The Interview By Wollan, Rowland, and Vandiver

AA. Following the interview with Dr. Kaufman on November 3, 1983, Mr. Ford again entered a period of time when he refused to see anyone seeking a visit with him. Mr. Wollan attempted to see Mr. Ford on November 18, and Mr. Ford abruptly and angrily left the interview after only ten minutes. Again on December 8, Mr. Wollan, accompanied by a paralegal (and friend of Mr. Ford), Margaret Vandiver, attempted to see Mr. Ford, but Mr. Ford refused to come to the visiting area. And again on December 15, 1983, Mr. Wollan, accompanied this time by Margaret Vandiver and Gail Rowland, attempted to see Mr. Ford. On this occasion, Mr. Ford did come to the visiting area and stayed for a few minutes. However, the content of this interview was quite different from any that had gone on before. While Mr. Ford's associations had become increasingly "loose" (*see DSM-III* in the Appendix I) during the course of his illness, in the interval between November 3, and December 15,

1983, his loosening of associations became "severe" (*see DSM-III*, at 182), in much the same way as Mr. Ford's letter of November 28, 1983 to his mother (*supra*, at pages 36-37) demonstrated a severe loosening of associations. The interview on December 15, 1983, transcribed from a tape recording, consisted entirely of the following:

Mr. Wollan . . . . How are you Alvin?

Mr. Ford . . . . (no response)

Mr. Wollan . . . . Do you mind if I sit a little closer with this mike?

Mr. Ford . . . . (no response)

Mr. Wollan . . . . What's the matter, Alvin? Are you going to sit there and not talk? What's troubling you? Alvin, it seems to me there's a lot in there you need to say and just sitting here and glowering at us is not going to help.

Mr. Ford . . . . (no response)

Mr. Wollan . . . . What would you like us to know? What would you like us to do?

Mr. Ford . . . . (kicks foot toward Mr. Wollan, showing bottom of flip flop)

Mr. Wollan . . . . What's that mean?

Mr. Ford . . . . (no response)

Mr. Wollan . . . . What's the trouble?

Mr. Ford . . . . (no response)

Ms. Rowland . . . . You have your jacket on. Are you cold? It's a little cool today. Are your feet cold in just the flip flops? I know I was pretty cold outside. We had to wait a few minutes outside before we could come in and it was chilly.

Mr. Ford . . . . Code one.

Ms. Rowland . . . . I'm real glad to see you. It's been a long time. I'm so glad you were able to come out. Are you still angry with me?

Mr. Ford . . . . No one.

Ms. Rowland . . . . No? It's been so long, I'm glad I was able to come here today and see you. I hope that we can talk some because I know you've been having a real hard time and I want so badly to be able to help. I haven't heard from you in a long time.

Mr. Ford . . . . Code one.

Ms. Rowland . . . . You need to tell me a little more than that because I'm not sure what you mean.

Mr. Ford . . . . Killed one.

Ms. Rowland . . . . I still don't understand.

Mr. Ford . . . . Killed one. Break one.

Ms. Rowland . . . . Killed one, break one?

Mr. Ford . . . . No one. Dead one.

Mr. Wollan . . . . Alvin, what does that mean?

Mr. Ford . . . . (no response)

Ms. Rowland . . . . I'm not sure what you mean. Can I sit a little bit closer? Will that bother you?

Mr. Ford . . . . No one.

Ms. Rowland . . . . Okay. I'll move my chair, my stuff . . . I brought my notebook in case you had anything you wanted me to write down. So you just tell me if you have something you want me to write down.

Mr. Ford . . . . State one. Electric one.

(pause)

Code one, take one.

Ms. Rowland . . . . Do you want me to write this down?

Mr. Ford . . . . Take one, off one. Code one, take one, say one, threaten one. Code one, off one.

Mr. Wollan . . . . Alvin, who should we tell this to?

Mr. Ford . . . . (no response)

Mr. Wollan . . . . Is there somebody who will know what this means?

Mr. Ford . . . . (spits in Mr. Wollan's direction, but not on him)

(pause)

Ms. Rowland . . . . Do you have anything else? I know there's something you'd like to say. Did you get my Christmas card?

Mr. Ford . . . . Seen one.

Ms. Rowland . . . . Did you get your birthday card, too? I sent you a birthday card.

Mr. Ford . . . . No one.

Mr. Wollan . . . . Have you been getting letters from your mother, Alvin?

Mr. Ford . . . . Jesus one.

Mr. Wollan . . . . Did you get my letter this week?

Mr. Ford . . . . No one.

(pause)

Write one.

(pause)

Ms. Rowland . . . You've lost a lot of weight since I saw you last. Have you not been very hungry?

Mr. Ford . . . . Yes, one.

Mrs. Rowland . . . . Don't you like the food here?

Mr. Ford . . . . No one.

Ms. Rowland . . . . Well, it doesn't always look too good.

Mr. Ford . . . . Certainly one.

Ms. Rowland . . . . You should eat a little, though, so you don't get sick.

Mr. Ford . . . . Say one.

(pause)

Ms. Rowland . . . . I'm glad that you came out. I was worried that you might not because I knew Larry and Margaret were here about a week ago . . .

Mr. Ford . . . . (grunts)

Ms. Rowland . . . . But you came out today. I'm glad. I'm real glad to see you.

Mr. Ford . . . . Night one.

(pause)

Today one.

Ms. Rowland . . . Do you have any two's? Or is everything one's today?

Mr. Ford . . . . Hands one, face one. Mafia one. God one, father one, Pope one. Pope one. Leader one.

Ms. Rowland . . . . I have to turn the page.

Mr. Ford . . . . Leader one. Now one, say one, crazy one. Track one.

(pause)

God one. Kill one.

Ms. Rowland . . . . Have you seen any newspapers or anything in awhile?

Mr. Ford . . . . Yes one.

Ms. Rowland . . . . Did you read about the Pope?

Mr. Ford . . . . Looking one.

Ms. Rowland . . . . And Bob Sullivan and the Pope . . .

Mr. Ford . . . . Looking one.

Ms. Rowland . . . . He made a nice statement. You saw it. I was very moved.

Mr. Ford . . . . Hello one, need you one.

(pause)

Gail one, threaten one, kill one.

(pause)

Remember one, letter one? Say one, God one, blind one, klan one, Destiny one?

(pause)

Mr. Ford . . . . Mine one. Stab one, say one crazy one.

(pause)

Need one, love one.

(pause)

But one, starve one, damn one.

(pause)

Damn one, say one.

Ms. Rowland . . . . I see . . .

Mr. Ford . . . . Excuse one, need you one.

(pause)

Tell him one. Hello one.

Ms. Rowland . . . . I see what you're saying and . . .

Mr. Ford . . . . Review one, law one. Dead one.

(long silence)

Ms. Rowland . . . . I do remember all your letters and I've read them, but sometimes it's hard for me to understand what's happening with you.

Mr. Ford . . . . Need one. Love one.

Ms. Rowland . . . . I care about you. I love you, Alvin. I love you like my brothers, like my own family.

Mr. Ford . . . . Time one.

(stands up)

Ms. Rowland . . . . Where are you going?

Mr. Ford . . . . Little one.

Mr. Wollan . . . . You ready to go?

Mr. Ford . . . . (opens door for guards to get him)

Ms. Rowland . . . . May I say goodbye?

Mr. Ford . . . . Yes one.

Ms. Rowland . . . . I'm sorry you weren't able to see us any longer. Goodbye.

Mr. Ford . . . . Little one.

(leaves with guards)

The Interview and Evaluation By The Commission of Psychiatrists

BB. On December 19, 1983, just four days after Mr. Ford's interview with Mr. Wollan, Ms. Vandiver, and Ms. Rowland, the commission of psychiatrists appointed pursuant to *Fla. Stat.* § 922.07 [4] interviewed Mr. Ford for approximately thirty minutes. Based upon the individual commission members' reports, confirmed

[4] Members of the commission were Dr. Peter Ivory (Chattahoochee), Dr. Umesh Mhatre (Lake City), and Dr. Walter Afield (Tampa).

by the observation of all those present for the commission's interview, Mr. Ford responded in the same manner to questions on December 19 as he had responded on December 15 in the Wollan, Vandiver, Rowland interview.

CC. On the basis of this brief interview with Mr. Ford, their subsequent observation of his cell, and their conversations with correctional officers about Mr. Ford, two of the three commission members concluded, as have Dr. Kaufman and Dr. Amin, that Mr. Ford suffers from psychosis. Dr. Mhatre concluded on December 28, 1983, that Mr. Ford suffers from "psychosis with paranoia." Appendix I, Mhatre Report. Dr. Afield concluded on January 19, 1984, that Mr. Ford suffers from a profound emotional illness that "forces me to put a 'psychotic' label on the inmate." Appendix I, Afield Report. Only Dr. Ivory, the third commission member, concluded that Mr. Ford does not suffer from psychosis or any other condition which impairs his ability to appreciate reality. Appendix I, Ivory Report.[5] The members of the 922.07 commission found, however, that Mr. Ford was, notwithstanding his condition, competent under the test of competency prescribed by Section 922.07.[6]

---

[5] It should be noted however that Dr. Ivory refused to review the history of Mr. Ford's illness, as documented in Mr. Ford's correspondence and as documented by the reports of Dr. Kaufman and Dr. Amin. Counsel offered Dr. Ivory these materials, but he refused to accept them until after the interview. Moreover, his report reflects no review of the materials. (Indeed, in light of his submission of his report to the governor the day after the interview with Mr. Ford, it is improbable that Dr. Ivory considered these materials at all.) The materials were accepted and reviewed by Dr. Mhatre and Dr. Afield. *See* Appendix I, Mhatre Report and Afield Report.

[6] In the 922.07 proceeding before the governor, counsel and Mr. Ford demonstrated that the conclusions of the two commission members who found Mr. Ford psychotic but nonetheless competent was as flawed as the opinion of the third commission member who found Mr. Ford free of psychosis. Unlike the third commission member, the two who found Mr. Ford psychotic did review Mr.

Current Observations About Mr. Ford

DD. After December 19, 1983 Mr. Ford refused to see his lawyers or the paralegals who have worked on his case until May 23, 1984. During this time, he did not respond to correspondence; nor did he initiate correspondence.

EE. Insight is available into Mr. Ford's current mental state through two sources. The first is the person who had a death warrant signed on the same date as Mr. Ford, John O'Callaghan, who has been housed next to Mr. Ford since April 30, 1984. He has provided the following observations of Mr. Ford:

> During the entire time we have been housed together Mr. Ford has acted and talked in a bizarre fashion:
>
> (a) Mr. Ford has repeatedly threatened to kill me and various guards. After he has made such threats, however, he will often ask me for a cigarette.
>
> (b) Mr. Ford talks to himself in a high-pitched voice. He then frequently gets into arguments with this "other" person which become violent fights, with Mr. Ford punching, rolling around, and struggling. At the end of these fights Mr. Ford is panting.
>
> (c) Mr. Ford frequently bangs his head against the wall and has fits, during which he is snorting and growling.

Ford's history and the prior psychiatric evaluations of Mr. Ford. However, in so doing, these commission members did not evaluate—indeed ignored—the delusions from which Mr. Ford suffered which bore directly upon his ability to understand why he was to be executed: the delusions which led him to believe that he was no longer under sentence of death. However, since no evidentiary proceeding was held by the governor, counsel for Mr. Ford has never been able to demonstrate—in an evidentiary sense—that the evaluations by the commission members were so flawed that their conclusions were worthless in comparison to the conclusions of Dr. Kaufman and Dr. Amin. As demonstrated in Appendix IIb, at Barnard Affidavit and Halleck Affidavit, counsel was prepared to offer such evidence.

(d) When his mail is given to him, Mr. Ford throws it on to the walk without ever reading it.

(e) Mr. Ford sometimes walks around his cell as if he were a robot.

(f) Every now and then Mr. Ford draws marks on the walls of his cell and touches the marks with various parts of his body.

(g) On May 18, 1984, when Mr. Ford was told that he had a legal visit, he responded, "Thank you one. Thank you one. Someone on J-Wing will see me."

During the time that we have been housed together, I have tried repeatedly to get Mr. Ford to talk sensibly with me. However, I have gotten no sensible response from him.

Appendix I, Affidavit of John O'Callaghan. The second is Dr. Harold Kaufman, who saw Mr. Ford again on May 23, 1984. Dr. Kaufman found that Mr. Ford had "seriously deteriorated" since he saw him on November 3, 1983; that Mr. Ford's paranoid schizophrenia had become severe; that Mr. Ford's contact with reality is now only minimal; and that Mr. Ford has no understanding of the fact that he is about to be executed. Further Dr. Kaufman found "highly unlikely" any possibility that Mr. Ford is malingering. *See* Appendix I, Kaufman Supplemental Report.

FF. The foregoing facts demonstrate that Mr. Ford is currently incompetent. His execution when he is incompetent would violate the eighth and fourteenth amendments.

(1) The right of a condemned person not to be executed when incompetent is well-established as a clear legal entitlement under Florida law. *Perkins v. Mayo*, 92 So.2d 641, 644 (Fla. 1957). That right is also protected by the eighth amendment's prohibition against cruel and unusual punishment. Under the two-part test for evaluating the eighth amendment constitutionality of

an aspect of the death penalty, *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977), the execution of the mentally incompetent is intolerable under contemporary standards of decency, and is violative of established constitutional doctrine requiring that a punishment must serve legitimate penological goals and not itself deprive the person punished of due process.

(2) The right of the condemned not to be executed when incompetent cannot, therefore, be voided without a due process proceeding in which the condemned person's competency is fairly determined. Only upon the conclusion of such a hearing, with the determination that the condemned person is competent, can the condemned person about whose competency there has been a reasonable doubt be executed.

(3) By providing only a proceeding before the Governor, in which there are no procedural due process protections, as the *exclusive* remedy for determining competency at the time of execution, *see* the opinion of the Supreme Court of Florida, May ——, 1984, in petitioner's case, the State of Florida has thus provided no remedy that is consistent with the fourteenth amendment for the protection of the condemned person's right not to be executed when incompetent. Such a remedy must, therefore, be provided in connection with the proceeding *sub judice* if sufficient facts have been alleged to invoke that remedy.

(4) The facts alleged herein create at least a reasonable doubt about Mr. Ford's current competency, thus necessitating a due process inquiry into his competency. *See Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966).

• • • •

Other Required Information

22. All of the grounds presented herein were presented to the state courts in the collateral proceedings discussed in ¶¶ 12-14, *supra*.

23. There is no other pending proceeding, state or federal, which attacks the judgment and sentence complained of herein, except for the following: petitioner has something an appeal in the United States Court of Appeals from this Court's disposition of the remand of *Ford v. Strickland*, (No. 81-6663-Civ-NCR). As the court knows, a stay of execution in connection therewith was denied by this Court on May 18, 1984.

24. Petitioner has been represented by the following counsel in the course of proceedings related to the judgment under attack herein:

A. At all pretrial proceedings, trial, and on direct appeal, petitioner was represented by Bob Adams, who has offices in Mariana and Fort Lauderdale, Florida.

B. In the state and federal collateral proceedings which are described in ¶ 10, *supra*, petitioner was represented by Richard H. Burr, West Palm Beach, Florida, and Laurin A. Wollan, Tallahassee.

C. In every state and federal collateral proceeding since those proceedings, petitioner has been represented by Richard L. Jorandby, Public Defender of the Fifteenth Judicial Circuit, and various of his assistants.

WHEREFORE, petitioner prays that the Court grant all relief to which he may be entitled in this proceeding, including but not limited to:

1. a stay of the execution of his death sentence during the pendency of these proceedings;

2. the grant of sufficient funds to enable petitioner to present expert testimony and lay testimony necessary to prove the facts as alleged herein;

3. the grant of discovery as requested by separate motion submitted herewith;

4. the grant of an evidentiary hearing at which petitioner is present to enable him to prove the facts as alleged herein;

5. the opportunity to submit post-hearing briefs; and

6. The granting of this petition for writ of habeas corpus.

Respectfully submitted,

[Counsel for Connie Ford as next friend for Alvin Bernard Ford]

[Names/Addresses of Counsel Omitted in Printing]

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Title Omitted in Printing]

[AFFIDAVIT OF NEXT FRIEND]

CONNIE FORD, being duly sworn according to law, deposes and says:

1. I am the natural mother of Alvin Bernard Ford. I currently live in Palmetto, Florida, and have lived in Manatee County, Florida, most of my life.

2. My son, Alvin, was born on September 22, 1953. Alvin lived with me at home until he graduated from high school. After his high school graduation, he moved to Gainesville, Florida, where lived until he was charged with the crime for which he is now on death row. During the time between his high school graduation and his arrest for this crime, my son and I were in frequent contact with each other by telephone and by mail.

3. My son was sent to death row at Florida State Prison in January of 1975. From that time until the end of October, 1982 I made frequent visits to the prison to see my son, and I corresponded with him regularly and frequently.

4. Until the summer of 1982, I knew of no mental health problem from which Alvin suffered. During the time he was growing up and living with me at home, he was never treated by a psychologist or a psychiatrist for any mental illness or disorder. As far as I knew, he suffered from no such condition. After Alvin left home, and even after he was sent to death row, I still knew of no mental health problem from which he suffered. This began to change, however, sometime during 1982.

5. In the summer of 1982, I first began to notice that my son was acting and talking in a very strange way. During a visit, he talked very strangely to me. He talked about marrying a girl at a radio station in Jacksonville who was later killed in an automobile accident. He also said that he saw the Klu Klux Klan set a house afire in Jacksonville where people were burned to death and that one of the Klansmen was staying at the prison. He also talked about seeing "the light" come through the ceiling of the house where the fire had been. After this visit, I began to think that there was something seriously wrong with his mind.

6. In my next visit with Alvin, on October 24, 1982, I felt certain that there was something wrong with his mind. In that visit, Alvin was very distant from me and from my daughter and her child, who accompanied me on the visit. He said over and over that we were not his family. After this had gone on for a while, I asked the correctional officers in the visitation area to let me and my daughter and granddaughter leave. Alvin was acting so strangely that I was bewildered and very upset. Alvin has refused to see me since that day.

7. Since that visit in October, 1982, I have received very few letters from Alvin. I have continued trying to write him during this period of time, but most of my letters are returned to me with a notation on the letters that Alvin has refusd to accept the letters. In this period of time, I or members of my immediate family have received three letters from Alvin. In all of these letters, Alvin has talked about me and other members of my family being held hostage in the prison. In the last letter I received from Alvin, he also talked about a number of other things which made no sense to me. In these letters, Alvin has said the following:

(a) Letter of December 5, 1982, to Alvin's grandmother:

Dear Grandmother,

I received your letter and card. I haven't written because of a number of reasons. I hope you will be well, feeling okay when this letter, reaches your hand. I have been okay. But I want to tell you don't, ever be afraid, of my dying, because this will happen one day.

You mentioned your being 73 years old, well don't let anyone threaten you into doing anything, at all. If anyone can, hurt a 73-year old woman, they have to be really sick, so try to understand, and just believe in God, and ask him to forgive those, that do you wrong.

I know you are inside, this prison, behind my cell. I have been wondering, how you got in this prison, also with mother, Gwen, and the other relatives.

I have been more surprised, in your not telling me from the first day you were, brought in this prison.

God, put your trust in God, don't write, and tell me lies. This is the reason, I had such a time, finding out about all the family, from this prison cell. So don't do anything, against your will, you are not to be held hostage, in this prison, by these people. God, is the answer, so take care of yourself as well as humanly possible.

Hopefully you knee is better. Also you were able to have the x-ray. Tell Uncle Henry hello, also he must be held hostage here, also. Tell him, he should write.

I won't be having any visits, until all my relatives, are safely out of this prison, one way or the other. I know now, about the relatives, as well as the outside world, so trust in God.

I've given these people, every choice, possible, to let you, and the relatives go, but looks as though,

they refuse. So if they hurt anyone, the crimes, will surely, have a lasting effect.

Thank you for the stamps and God bless you, and keep you safe. Trust in no one, but God.

Sincerely, Alvin B. Ford A/K/A Sherlock.

(b) Letter of May 8, 1983 to me:

Dear Mother:

Here is a list of people trying to help, and there's many more. This postage stamp, showing the mail is illegal, or no stamp on the mail, stealing money from the U.S. Government.

This has been done some 315 days, stealing the mail from my cell door, then taking it, to the pipe alley on N-Wing, S-Wing, R-Wing and Q-Wing.

The world knows you are here and been hostage with your family since July, 1982.

Thank God he has sent so many great leaders. This hounding was meant to drive my lawyers insane. Please listen to my lawyers no matter, what these prison people say.

There's FBI, I know about, so keep them safe, as they do you also try, no to bother, others, with the hounding. They do this because you don't know the full story. Trying to hurt my lawyers, sorry I had to say something. The lawyers are human, and hurt the same as you, even worst, because they see, how you have been hurt.

Just try to stay alive, do what Deborah Fins tell you, not matter what she would tell you anything wrong. . . .

Hopefully you are well. You have been 315 days inside Florida State Prison, with [the names of 135 people are then listed].

(c) Letter of November 28, 1983, to me:

Dear Mother,

Its been a while, since I wrote, but there was no need, with this government, or rather this state, having so many problems.

Couldn't imagine this state, and the U.S. Government could be so, corrupt. Also the other countries of this, universe. Excuse the above mistakes, rushed and making notes for the service. If my aides, were at hand, the mistakes would have been cleared. So overlook them.

Expect some lawsuits about this letter so, to all, concerned, be well informed.

If you can send some money and stamps, say whatever, you can, I have asked Wife 1, Britian, she said $400.00, Wife 2 $500.00, Sandra Wife 3 said $1.00, Wife 4 said $300.00, Wife 5 $600.00, Wife 6 said $200.00, Wife 7 $100.00, Wife 8 (no reply) Wife 9 said (it's a damn insult) Wife 10 said, (No comment).

Also send stamps, they're 30 cents so, listen you take care. Laugh God won, Daniel won, page 7 one 2 one, 6 one fort note D won, right one wrong one, wrong one right one. D one 3 one ½ one, years one.

Can't imagine people can try, what they have. Need anything. No never, as long as my family and wifes are safe.

Rushed so the letter, shall be review by reporters, mistakes? Note private. Aides tapes, etc . . . Take care.

Love you, Sherlock.

8. On the basis of everything I have known about my son all his life, I believe that he is severely ill. He had

no mental illness until sometime in 1982, beginning in that year, he became more and more ill. I am convinced that he no longer has the ability to protect himself or his interests. I believe very strongly that he no longer knows what may happen to him in prison or why it may happen to him. Because of these beliefs, and on the basis of the facts I have talked about in this affidavit, I believe that he needs me to protect his interests because of his inability to do so.

/s/ Connie Ford
CONNIE FORD
Mother of Alvin Bernard Ford

[Jurat Omitted in Printing]

[Verification Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

[EXCERPT FROM APPENDIX TO PETITION FOR WRIT OF HABEAS CORPUS: REPORT OF DR. JAMAL AMIN, JUNE 9, 1983]

[Return Address/Greeting Omitted in Printing]

PURPOSE AND METHODOLOGY

Requested by Defense Attorneys to present my professional opinions regarding Mr. Alvin Ford's present mental status using the following paradigm—in spite of his refusal to currently cooperate with any mental health professional: (1) A total of four separate in-person evaluations at Florida State Prison commencing July, 1981 and ending August, 1982. (2) A recently taped conversation between Mr. Ford and his attorneys. (3) Recent letters written by Mr. Ford to Relatives, Attorneys, and Myself. (4) Interviews with relatives, attorneys, other inmates, prison personnel, and others with direct observations of Mr. Ford's behavior in the past three months. (5) July and August, 1982—Psychological Evaluations by Psychologists Pittman and Fleet. (6) August, 1982—Psychiatric Evaluation by Prison Psychiatrist Doctor Innocent. (7) Florida State Prison Medical Records.

CURRENT SITUATION

Mr. Ford is presently incarcerated on Death Row at Florida State Prison while his legal efforts proceed through the courts. He is not receiving treatment for any mental disorder in spite of gradual changes in his behavior first noted in December, 1981. He has steadfastly refused psychotrophic medication and has become in-

creasingly withdrawn, uncooperative, and bizarre in his interactions with familiar persons.

SIGNIFICANT FINDINGS RELATED TO MENTAL STATUS

(1) During the last psychiatric evaluation—the examiner was impressed with the feelings of "emotional distance" and an inability to establish a previously on-going empathic rapport.

(2) Affect and moods are no longer appropriate or adequate to Mr. Ford's present situation indicating some disturbance in the regulation of his affect or emotions.

(3) The content of Mr. Ford's speech increasingly leans toward the symbolic, the esoteric, and the abstract.

(4) Episodes of the abrupt blocking of the stream of thought when Mr. Ford ceases to speak in the middle of a sentence.

(5) Mr. Ford has difficulty in organizing his thoughts by the usual rules of universal logic and reality. His associations are loose, his attention span is diminished, and he appears unable to prevent the intrusion of irrelevant material into his thought processes. Also, he has difficulty in maintaining appropriate levels of abstractness as he accentuates obscure features while ignoring central issues. This decrease in his abstract attitude has been accompanied by an increase in his concrete thinking.

(6) Mr. Ford is unable to differentiate fantasy from reality and his fantasies become part of the basis for his delusions. He relates fantasies which indicate that he feels his thoughts are being controlled or influenced by "outside forces" such as a female disk jockey in Jacksonville, Florida.

(7) Mr. Ford has developed complex, yet logical paranoid and delusional systems usually after the false interpretation of some actual occurrence. His paranoia and delusional thinking have centered around "the Klu Klux Klan", nonexistent love affairs with any female showing interest in his predicament, and secret messages from the raido, television, and books.

(8) There are convincing and consistent indications that Mr. Ford suffers from auditory and visual hallucinations. He has consistently maintained that he sees and hears incidents on his cell block involving his mother's murder; an unidentified inmate threatning to kill him with a gun, knife, or cleaver; and an unidentified woman repeatedly being beaten and raped. Reality testing does nothing to shake Mr. Ford's faith in his hallucinations which were first reported approximately twenty months ago. Prison guards and other Death Row Inmates have reported episodes of Mr. Ford speaking out loud and angryly to seemingly nonexistent persons.

(9) There is strong evidence of suicidal ideation both past and present.

(10) Florida State Prison Medical Records indicate that Mr. Ford has been treated for "Peptic Ulcer Disease since 1978 and that there was one instance of treatment for an "Agitated Depression" in 1982. His medical records also reflect numerous stress related somatic complaints such as chest pains, stomach pains, joint pains, and skin reactions.

(11) There is a documented history of severe drug abuse of substances such as Cocaine, LSD, Alcohol, and Amphetamines.

(12) Mr. Ford appears to have very little insight into the fact that he has any emotional problems and goes to great lengths to deny mental illness.

CLINICAL IMPRESSIONS AND DYNAMIC FORMULATIONS

Mr. Ford's above outlined list of at least twelve present and past abnormal signs and symptoms—coupled with the reality of severe on-going tensions and anxieties produced by Death Row confinement should be overwhelmingly convincing for a psychiatric diagnosis related to a "Paranoid Schizophrenic Breakdown".

Since there are no psychological tests for Schizophrenia which are comparable to an empirical test for something like Syphilis—it is not unusual for Schizophrenic patients to show the "normal psychological profile" which Prison Psychologists Pittman and Fleet obtained from administering psychological tests approximately ten months ago.

Mr. Ford's psychotic episodes which initially were intermittent have increasingly become sustained and in the typical pattern of psychiatric decompensation he goes to great lengths to deny any mental illness and to give the appearance of being mentally intact. Therefore, it is understandable how Prison Psychiatrists concluded "Malingering" because it is not unusual for "Functional Schizophrenics" such as Mr. Ford to muster enough "psychic glue" to remain mentally intact during periods of time when they are dealing with persons they distrust. However, prison reports of "Malingering" seem to ignore psychotic symptomatology noted in their own reports. For example, all prison reports state that Mr. Ford alleges that he sees and hears unusual things (auditory & visual hallucinations) and that he acquired a knife for his protection against an imaginary enemy (paranoia). Furthermore, prison evaluations which state that part of their reason for concluding malingering is based upon the "absence of psychological difficulties in the subject's history" are in error when one considers a Prison Psychiatrist's diagnosis of "Agitated Depression" and the prescribing of tranquilizing/anti-depressant medication known as "Sinequan". It should be noted that in the

typical fashion of someone experiencing psychotic decompensation—Mr. Ford was suspicious of his medication and refused to take it. Also, his history of drug abuse and treatment of Peptic Ulcer Disease would cast doubts on statements indicating no past psychological difficulties.

Mr. Ford's delusional thinking which cannot be corrected by reasoning or reality testing—represents a desperate attempt to regain control because he is strictly confined and feels harassed, powerless, and increasingly fragmented. He appears grandiose because he has deluded himself into feelings of exaggerated importance because so much effort revolves around his prosecution and defense.

Alvin Ford's suicidal ideation is dynamically related to the following factors: (1) The intense, on-going stress and anxiety of an impending electrocution. (2) Psychotic behavior which is becoming increasingly ineffective as a defense against overwhelming depression. (3) An unconscious desire to succumb to a mental disease so that himself and his socio-cultural community can better accept his disgraceful situation.

CONCLUSIONS

In my professional opinion—Mr. Alvin Ford is presently suffering from a severe, uncontrollable, mental disease which closely resembles "Paranoid Schizophrenia With Suicidal Potential". This major mental disorder is severe enough to substantially affect Mr. Ford's present ability to assist in the defense of his life.

It should be noted that Mr. Ford's ambivalence around whether to continue his legal fight is in and of itself an indication of a psychotic disorder so severe that it suicidally compels him to embrace his own death.

RECOMMENDATIONS

(1) Arrangements should be made for Mr. Ford to receive a complete Psychiatric, Neurological, and

Nutitional Work-up to rule out causes related to toxins, organic lesions, and/or Vitamin Deficiencies.

(2) Psychothrophic medication in a liquid or injectable form should be considered to ameliorate some of the more blatant symtomatology.

Respectfully submitted,

/s/ JAMAL A. AMIN, M.D.,M.P.H.
Psychiatrist/Nutritionist

[EXCERPT FROM APPENDIX TO PETITION FOR WRIT OF HABEAS CORPUS: REPORT OF DR. HAROLD KAUFMAN, DECEMBER 14, 1983]

[Return Address/Greeting Omitted in Printing]

I am writing this report in response to your request that I present the findings of my three hour interview with Alvin Ford which I conducted at Starke, Florida, on November 3, 1983, to determine his competency to be executed.

You will recall that both you and Professor Laurin Wollan, who has taken an interest in Mr. Ford's case, where present for about ninety minutes of the interview which took place in an interview room at the Starke Prison. I have received from you the standards for "competency for execution," and, as discussed below, have applied them to my psychiatric findings.

Mr. Alvin Ford entered the interview room in apparent high spirits and bantered for about fifteen minutes with you and Professor Wollan. He generally ignored me and my occasional questions. It should be noted that your and Professor Wollan's presence was deemed necessary by me to allow the interview to progress at all because of Mr. Ford's previous (and I understand subsequent) extreme reluctance to be interviewed. I also suggested your presence in order to set him more at ease so that he would be more inclince to be trustful, open and relaxed with me, whom he had never before met.

After about fifteen minutes of questioning by him and answers by the two of you he turned to me and said, "You a good guy? You OK?" I replied that I thought I was "OK."

Up to this point his questions had been disjointed, and had ranged from personal details ("food's OK—how you eatin'") to delusional questions ("When CBS comin' in

here."). But after 15 minutes the incoherence of his mental associations and the almost totally delusional nature of anything to do with his case emerged as his facade crumbled. One thought led to another with no seeming relation to the previous one with such rapidity that I have come to the conclusion that there is no reasonable possibility that Mr. Ford was dissembling, malingering or otherwise putting on a performance to induce me to believe him to be psychotic or incompetent to be executed.

It is unfortunate that no tape, especially a videotape, exists to preserve for concerned observers the obvious fact that he was not "acting" for my benefit—or for his own. I think the best way to convey the spontaneous and psychotic nature of his ramblings is to simply record them (see below). These are not selected passages, but a stream of consciousness, either spontaneously rendered, or spoken in response to a previous question. It is to be noted that there was very little animation or feeling in Mr. Ford's voice as he spoke, only a kind of 'flatness'" or lack of intensity of affect.

Mr. Ford**: The guard stands outside my cell and reads my mind. Then he puts it on tape and sends it to the Reagans and CBS . . . I know there is some sort of death penalty, but I'm free to go whenever I want because it would be illegal and the executioner would be executed . . . CBS is trying to do a movie about my case . . . I know the KKK and news reporters all disrupting me and CBS knows it. Just call CBS crime watch . . . there are all kinds of people in pipe alley (an area behind Mr. Ford's cell) bothering me—Sinatra, Hugh Heffner, people from the dog show, Richard Burr, my sisters and brother trying to sign the death warrants so they don't keep bothering me . . . I never see them, I only hear them especially at night. (Note that Mr. Ford denies *seeing* these people in his delusions. This suggests

** Comments in parentheses are my own.

that he is honestly reporting what his mental processes are.) I won't be executed because of no crime . . . maybe because I'm a smart ass . . . my family's back there (in pipe alley) . . . you can't evaluate me. I did a study in the army . . . alot of masturbation . . . I lost alot of money on the stock market. They're back there investigating my case. Then this guy motions with his finger like when I pulled the trigger. Come on back you'll see what they're up to—Reagan's back there too. Me and Gail bought the prison and I have to sell it back. State and federal prisons. We changed all the other counties and because we've got a pretty good group back there I'm completely harmless. That's how Jimmy Hoffa got it. My case is gonna save me.

At this point I should comment that none of this "idea salad" is out of context. Indeed there is no apparent context for these rambling, disorganized delusional bits of ideational material.

I asked, "Are you going to be executed?" Mr. Ford replied, "I can't be executed because of the landmark case. I won. Ford v. State will prevent executions all over.

Dr. Kaufman (Q): Are you on death how?

Mr. Ford (A): Yes.

Q: Does that mean that the State intends to execute you?

A: No.

Q: Why not?

A: Because Ford v. State prevents it. They tried to get me with the FCC tape but when the KKK came in it was up to CBS and the Governor. These prisoners are rooming back there raping everybody. I told the Governor to sign the death warrants so they stop bothering me.

Pulling this material together I have come to the conclusion that Mr. Ford is suffering from schizophrenia, undifferentiated type, acute and chronic. The delusional material, the free-floating and disorganized ideational and verbal productivity, and his flatness of affect are the highlights of the signs leading to this diagnosis of psychosis. The possibility that he could be lying or malingering is indeed remote in my professional opinion.

You have asked me to relate Mr. Ford's psychiatric condition to several standards which might be used to determine his competence to be executed. It is my conclusion, using the Florida Statutory standard you have supplied me with, that because of his psychiatric illness, while he *does* undertsand the nature of the death penalty, he lacks the mental capacity to understand the reasons why it is being imposed on him. His ability to reason is occluded, disorganized and confused when thinking about his possible execution. He can make no connection between the homicide he committed and the death penalty. Even when I pointed this connection out to him he laughed derisively at me. He sincerely believes that he is not going to be executed because he owns the prisons, could send mind waves to the Governor and control him, President Reagan's interference in the execution process, etc.

Moreover, it is my conclusion that the disorganized state of his thinking is sufficiently severe to prevent Mr. Ford from being executed under the Solesbee v. Balkom standard of Justice Frankfurter which you forwarded to me. In particular, Mr. Ford's "defects of facilities" prevent him from being capable of understanding "the purpose of his punishment."

In summary, it is therefore my professional opinion, based on my interview with Mr. Alvin Ford, that he is suffering from schizophrenia, undifferentiated type, acute and chronic, which is of such severity that he cannot sufficiently appreciate or understand either the reasons

"why the death penalty was imposed on him" or "the purpose" of this punishment. It is therefore my opinion that Mr. Alvin Ford is incompetent to be executed.

Sincerely yours,

Harold Kaufman, M.D. and LLB.
Psychiatrist

[EXCERPT FROM APPENDIX TO PETITION FOR WRIT OF HABEAS CORPUS: REPORT OF DR. PETER IVORY, DECEMBER 20, 1983]

[Return Address/Greeting Omitted in Printing]

Pursuant to Executive Order Number 83-197, accompanied by Doctors Afield and Mhatre, I examined inmate Alvin Bernard Ford from 10:50 a.m. to 11:25 a.m. at Florida State Prison on December 19, 1983. We later talked to prison officers, viewed the inmates cell, and talked to a prison psychiatrist.

The interview was conducted with great difficulty, from a verbal point of view, since the inmate responds to questions in a stylized, manneristic doggerel. Thus, an answer to a question might be "beckon one, cane one, Alvin one, Q one, King one".

It soon became apparent that our opinions would have to be based largely on inferential deduction from physical behaviorial observation, and only to a limited extent from his verbalizations.

From a behavioral point of view, then, the inmate entered the examination room in a quiet, cooperative, and appropriate manner. By helpful and responsive body movements, he helped the officer adjust the handcuffs. In an alert fashion he seemed interested and concerned about meeting the group of us, who also included attorneys and legal interns. When questioned, he answered promptly and then awaited the next question quietly and alertly. During his doggerel, and nonsensical, answers, if one of the examiners asked a question before he was finished, the inmate would raise his voice so as to dominate the situation and thus maintain control.

I formed the opinion that the inmate knows exactly what is going on and is able to respond promptly to external stimuli. In other words, in spite of the verbal appearance of severe incapacity, from his consistent and appropriate general behavior, he showed that he is in touch with reality.

Later exchanges seem to bear this out, if one "reads between the lines":

Q "Are you aware they can electrocute you?'
A "Nine one, C one, hot one, die one"
A "Die one, gone one"
Q "Are your attorneys trying to prevent your death?"
A "Assasinate one, Bob Graham liable one, Jim Smith liable one, Senate one"
Q "What happens if you die?'
A "Hell one, Heaven one"
Q "Which?"
A "Hopefully it'll be Heaven, but if I listen, it'll be Hell"

And later:

A "If I die—no more fat cats

—no more homicide

—no more racism

—in Heaven with God"

Q "Are you crazy?"
A "Are *you* crazy (Said in such a tone as to indicate that he was no more crazy than I was)

At a time when we had been trying to establish if he read the Bible, he commented: "blood on the door posts, you know" (said with a knowing smile that indicated that he would be spared by the Angel of Death, Exodus 12:7)

By this time, I had formed the opinion that the inmate did comprehend the nature and effect of the death penalty and why it was imposed on him.

However, because of the severe adaptational disorder that had been developed by the inmate, by which he is trying to "hold at bay" on intolerable future that he cannot otherwise deal with, I decided to validate my ideas by examining his cell and talking to staff members. The rationale for this course of action was dictated by the

reasoning that if the inmate was truly as disorganized as he would have one believe, there would be ample signs of it in his environment. The results were as follows:

1) the cell was spotlessly clean and in order

2) his toilet articles were neatly arranged around the sink

3) his personal papers were all stacked neatly in the cell bars, arranged by category

4) his writings were extensive, and the choice of vocabulary showed a good intelligence

5) the arrangements were all logical, and there was nothing in the cell that seemed bizarre, as if he was out of contact with the real world

6) the officers stated that the inmate behaves normally in that he feeds himself, clothes himself and keeps himself clean. He utilizes the available resources to his maximum advantage.

7) he talks normally to the guards, but during the last week they have heard him practicing the strange speech from lists of words he had written in nonsensical order

To comment briefly, a natural insanity is not selective, but is pervasive. This inmates disorder, although severe, seems contrived and recently learned.

My final opinion, based on observation of Alvin Bernard Ford, on examination of his environment, and on the spontaneous comments of group of prison staff, is that the inmate does comprehend his total situation including being sentenced to death, and all of the implications of that penalty.

From a humanitarian point of view, this inmate is obviously having enormous problems dealing with his possible destiny. It is suggested that a medical review to look into the feasibility of psychotropic medication

might be helpful, to allow the inmate to better assist his attorneys, and to set his affairs in order.

Please let me know if I can provide further information or be of other assistance.

Very truly,

/s/ Peter B.C.B. Ivory, M.D.
PETER B.C.B. IVORY, M.D.
Psychiatrist

[EXCERPT FROM APPENDIX TO PETITION FOR WRIT OF HABEAS CORPUS: REPORT OF DR. UMESH MHATRE, DECEMBER 28, 1983]

[Return Address/Greeting Omitted in Printing]

As per your order I examined Mr. Alvin Ford, on December 19, 1983 at Florida State Prison, along with my distinguished colleagues, Dr's. Peter Ivory and Walter Afield. Following is the summary of my evaluation with my conclusions:

Mr. Ford was evaluated at 11:00 a.m. in the courtroom of Florida State Prison. He was appropriately dressed, and exhibited good eye contact with all the people in the room, he did not exhibit any stranger anxiety or fears. He settled down in a chair, accompanied by his lawyers, and his friends through the Florida Clearinghouse on Criminal Justice. As per prior arrangement, Dr. Afield began to ask him questions. Mr. Ford did not initially respond but did so after his lawyer encouraged him. Most of his responses to the questions were bizarre. He continued to respond by jibberish talk such as "break one", "God one", "heaven one". However, throughout these bizarre responses, Mr. Ford kept good eye contact with the examiners. After awhile, his responses to questions became a little more appropriate indicating that he did understand the meaning of the questions asked of him, even though his responses remained somewhat bizarre. Throughout the interview which lasted about thirty minutes, there was no evidence of any hallucinations and Mr. Ford exhibited good ability to concentrate. He was relaxed and did not exhibit any physical aggression. In response to Dr. Afield's question, "what will happen when you die?", Mr. Ford responded "heaven one, hell one", indicating that he did understand the meaning of the question.

His mood appeared to be normal and affect was blunted. He did however smile and exhibited good range of affect

with his friends from his lawyer's office. His orientation and memory were not formerly tested, but he did appear to be oriented to people and place. He did not exhibit any suicidal or homocidal thoughts.

The conversation with the guards at Florida State Prison who have been working with Mr. Ford, furnished the following information. His jibberish talk and bizarre behavior started after all his legal attempts failed. He was then noted to throw all his legal papers up in the air and was depressed for several days after that. He especially became more depressed after another inmate, Mr. Sullivan, was put to death and his behavior has rapidly deteriorated since then. In spite of this, Mr. Ford continues to relate to other inmates and with the guards regarding his personal needs. He has also borrowed books from the library and has been reading them on a daily basis. A visit to his cell indicated that it was neat, clean and tidy and well organized.

The review of the extensive material provided by his lawyers including reports by Dr. Kaufman and Dr. Amin, and his correspondence with Gil Roland of Florida Clearinghouse and Criminal Justice indicate that Mr. Ford has been gradually decompensating since July and has worsened since the death of Mr. Sullivan.

It is my medical opinion that Mr. Ford has been suffering from psychosis with paranoia, possibly as a result of the stress of being incarcerated and possible execution in the near future. In spite of psychosis, he has shown ability to carry on day to day activities, and relate to his fellow inmates and guards, and appears to understand what is happening around him. It is my medical opinion that though Mr. Ford is suffering from psychosis at the present time, he has enough cognitive functioning to understand the nature and the effects of the death penalty, and why it is to be imposed upon him.

I may further add that considering his present state of mind, Ford is in need of appropriate antipsychotic medication, without such treatment he is likely to de-

teriorate further and may soon reach a point where he may not be competent for execution. I have discussed this with the psychiatrist of the Florida State Prison and hopefully, by the time you receive this report, Mr. Ford will be on appropriate treatment regiment.

Thank you for giving me the opportunity to be of some help to you. If I can be of any further assistance in the future, please do not hesitate to call upon me.

Sincerely,

Umesh Mhatre, M.D.

[EXCERPT FROM APPENDIX TO PETITION FOR WRIT OF HABEAS CORPUS: REPORT OF DR. WALTER AFIELD, JANUARY 19, 1984]

[Return Address/Greeting Omitted in Printing]

At your request, I examined Alvin Bernard Ford in the Florida State Prison, at Starke on December 19, 1983. As part of this evaluation, I reviewed the extensive records provided to me by legal counsel from your office. I had an in-depth conference with both attorneys for the inmate and reviewed the medical records that they had available. I talked at length with a variety of guards who had dealings with the inmate and reviewed the contents of Mr. Ford's writings in his cell. I discussed his medical condition with the prison psychiatrist and examined the man in the presence of all counsels and two other state-appointed psychiatrists. My examination consisted of a complete mental status examination. Subsequently, I spoke at length with Attorney Burr and reviewed complete medical records from the prison, which included psychiatric evaluations and reports from several prison psychologists. I reviewed in depth Dr. Kaufman's findings.

It is my medical opinion that Mr. Ford does indeed suffer from serious emotional problems. He is presenting himself in a very disorganized manner with a bizarre picture which does not fit any classical description of psychiatric illness. The nature of his disorganization is somewhat "put on," but the profoundness of it forces me to put a "psychotic" label on the inmate. Again, this is not a classical psychiatric diagnosis, but the man clearly is quite emotionally ill. Much of this had to do with the sentence that he is currently facing and his situation within the prison setting. On the basis of all the data and in light of the Florida Statute 922.07, it is my opinion that although this man is severely disturbed, he does understand the nature of the death penalty that he is

facing and is aware that he is on death row and may be electrocuted. The bottom line, in summary is, although sick, he does know fully what can happen to him. If there is anything further you wish please let me know.

Sincerely yours,

Walter E. Afield, M.D.

[EXCERPT FROM APPENDIX TO PETITION FOR WRIT OF HABEAS CORPUS: SUPPLEMENTAL REPORT OF DR. HAROLD KAUFMAN, MAY 24, 1984]

[Return Address/Greeting Omitted in Printing]

I am writing this report to summarize the findings of my examination of Alvin Ford at Florida State Prison in Starke on May 23, 1984.

The examination took place in a small room on the ground floor of the prison and lasted approximately two hours. As you recall you, Laurin Wollan, Esq., and Deborah Fins, Esq. were present during much of the interview.

Mr. Ford was in the interviewing room handcuffed when we arrived. He appeared to have lost at least twenty (20) pounds since I had last examined him on November 3, 1983. He was neatly dressed and was wearing rubber shower sandals. He did not greet the four of us as we entered and sat down. He sat with his body immobile and his handcuffed hands in a prayerful position in front of his mouth. Occasionally he moved his hands, still in the praying mode, to each of us for no apparent reason. His lips were pursed intermittently, but his head moved little. His eyes were closed or fluttering most of the time, although he occasionally glanced at one or more of us. His hands and fingers appeared to be trembling. We took turns asking him questions, and little or no response was forthcoming. He began muttering to himself after about five minutes. These utterances were largely unintelligible. This is the overall picture of what took place for two hours.

Because of his lack of responsiveness to the group, each of us tried speaking with him alone with the others out of the room. His utterances increased in number, but they remained soft mumbles. To the extent that they could be understood they were largely incoherent state-

ments about "God," "Hell," and a recitation of numbers. His hands remained in a praying position for the full two hours of the interview.

When I asked him whether he understood that the Governor of Florida had signed his death warrant and that he was to be executed on May 31, Mr. Ford gave no evidence of understanding what I asked him: his muttering continued and his hands remained in front of his face.

He occasionally motioned to be taken to the bathroom: it appeared that interaction with prison personnel was equally disorganized. The level of autism was much more profound than in November.

It is my conclusion based on this interview that Mr. Ford's condition has seriously deteriorated since November 3, 1983, when I last examined him. It is highly unlikely that he is malingering because he could not possibly know what the legal consequences of his behavior might be. Mr. Ford's condition, severe paranoid schizophrenia, has seriously worsened, so that he now has at best only minimal contact with the events of the external world. Accordingly, he has no understanding that he is soon to be executed, or what execution means, as a result of his psychosis. It is my opinion therefore that he is not competent to be executed under the provisions of Florida's statute.

Sincerely yours,

HAROLD KAUFMAN, Psychiatrist

[EXCERPT FROM APPENDIX TO PETITION FOR WRIT OF HABEAS CORPUS: AFFIDAVIT OF SEYMOUR HALLECK, MAY 21, 1984]

[Opening Jurat Omitted in Printing]

SEYMOUR L. HALLECK, being duly sworn according to law, deposes and says:

1. I am a professor of psychiatry in the School of Medicine at the University of North Carolina in Chapel Hill, North Carolina. My address is Department of Psychiatry, North Carolina Memorial Hospital, University of North Carolina, Chapel Hill, North Carolina.

2. For many years I have taught and practiced forensic psychiatry. During this time I have also published numerous articles and treatises on this subject. (A copy of my curriculum vitae is attached hereto).

3. On May 16, 1984, I was contacted by Richard H. Burr, from the Office of the Public Defender in West Palm Beach, Florida. Mr. Burr informed me that he represented a man named Alvin Ford who was on death row in Florida and was scheduled to be executed on May 31, 1984. He further informed me that Mr. Ford's competency to be executed has been in question since October, 1983. In this regard, he described to me the process by which Mr. Ford's competency had been evaluated by three psychiatrists who had been commissioned by the Governor of Florida, pursuant to *Fla. Stat.* § 922.07 (1983), to assist the Governor in determining whether Mr. Ford understood the nature and effect of the death penalty and why it was to be carried out against him. Mr. Burr asked that I comment upon this process from the perspective of the standard of care which must be followed to render an adequate, reliable forensic psychiatric evaluation under the circumstances described.

4. The purpose of this affidavit is to provide the commentary requested by Mr. Burr.

5. In my review of the process followed by the 922.07 commission in evaluating Mr. Ford, I have examined the following:

(a) the documents provided by Mr. Burr to each commission member in advance of the evaluation of Mr. Ford;

(b) a transcript of an interview with Mr. Ford on December 15, 1983 which was similar in content to the commission's interview on December 19, 1983; and

(c) the written evaluations by the commission members.

6. In addition I have relied upon the following (provided by Mr. Burr) as the description of the process of evaluation followed by the commission:

> The commission members appointed by Governor Graham to examine Mr. Ford were Dr. Peter Ivory (Florida State Hospital, Chattahoochee), Dr. Umesh Mhatre (private practitioner, Lake City), and Dr. Walter Afield (private practitioner, Tampa). The commissioners were scheduled to see Mr. Ford on December 19, 1983. On December 15, 1983, in order to orient the commission members to Mr. Ford's illness and to the reasons counsel for Mr. Ford thought he was incompetent, counsel sent a letter and a number of documents along with that letter to each commission member. Those documents included the following: an excerpt from the transcript of Mr. Ford's trial in December of 1974 in which Dr. David Taubel provided a psychiatric profile of Mr. Ford; a large sampling of correspondence from Mr. Ford over the previous two years which counsel for Mr. Ford thought provided the best history of Mr. Ford's illness that could be obtained; a psychiatric evaluation prepared in June, 1983 by Dr. Jamal Amin, a psychiatrist from Tallahassee; and a psychiatric evaluation prepared by Dr. Harold Kaufman, of Washington, D.C., in December 1983. When counsel

tendered these materials and his letter to Dr. Ivory, he refused to accept them. Dr. Mhatre and Dr. Afield did accept them.

On December 19, 1983, Dr. Afield, Dr. Mhatre, and Dr. Ivory conducted the interview of Mr. Ford in the courtroom at Florida State Prison. Present in the courtroom along with the three psychiatrists and Mr. Ford were Arthur Wiedinger (counsel from the Governor's Office), one or two correctional officers, two paralegals who had worked closely with Mr. Ford (Gail Rowland and Margaret Vandiver), and the two lawyers who had worked with Mr. Ford (Laurin Wollan and Richard Burr). The interview lasted approximately thirty minutes. During the course of the interview, the psychiatrists asked very simple, straight-forward questions attempting to solicit whether Mr. Ford understood the nature and effect of the death penalty and why the death penalty was being imposed upon him, and he responded in the same manner to these questions as he had responded in an interview by Mr. Wollan, Ms. Vandiver, and Ms. Rowland on December 15, 1983.

After approximately thirty minutes, the commission members determined that further interview of Mr. Ford would be fruitless and thus terminated the interview. Thereafter, they requested that they be able to examine Mr. Ford's cell. Their request was granted, and the three of them were taken back to Mr. Ford's cell. Their observations of Mr. Ford's cell and their conversations with correctional officers who were available to them in their visit to Mr. Ford's cell are recounted in their reports. Following their visit to Mr. Ford's cell, the commission members, or at least some of them, reviewed Mr. Ford's medical records and discussed his condition with the prison's medical staff. Following their review of medical records, the commission members concluded their on-site evaluation. Before leaving the

prison, Dr. Ivory, who had refused to accept the materials previously offered to him, requested that he be provided the materials. A copy was provided to him at approximately noon on December 19, 1983.

In the days that followed, the commission members prepared and sent their reports to Governor Graham. Dr. Ivory sent his report the very next day, December 20, 1983. In his report, he made no mention of having reviewed any of the materials counsel provided to him, and his evaluation reflected no knowledge of these materials. Dr. Mhatre and Dr. Afield, on the other hand, did report that they had reviewed these materials, and their evaluations reflected that they had done so.

7. In my opinion, the process of evaluating Mr. Ford's competency, as reflected in the foregoing account as well as in the material I have reviewed, fell below the generally accepted standard of care necessary to produce a reliable forensic psychiatric evaluation. The reasons for my opinion are as follows:

(a) The conditions under which the interview was conducted, including the amount of time spent interviewing Mr. Ford, were unlikely to produce sufficient data for reliable forensic evaluation. The interview was conducted in a courtroom, and a "room full" of people, including one or more correctional officers, was present. The environment was thus not conducive to the informal, intimate setting which is generally necessary to establish sufficient rapport for a psychiatric interview. In the setting described it would have been extremely difficult for Mr. Ford to fully reveal his problems or the nature of his illness. The thirty minute effort to establish communication under the conditions already noted was also inadequate. On rare occasions some patients can be accurately diagnosed in such a brief period. Mr. Ford's diagnosis, however, was not easily made due to the unusual nature of his behavior and his unusual method of

communicating. If the issue involved in the evaluation was simply an accurate medical diagnosis one or more hours of interviewing in a private setting would have been essential. Since there were difficult legal issues to be resolved, however, such as the nature of Mr. Ford's understanding of his situation, even more detailed examination was required. Furthermore, there was ample reason to suspect from previous psychiatric reports that Mr. Ford was difficult to interview and would not disclose himself early in an interview. In a letter from Mr. Burr, the examining doctors were urged to interview Mr. Ford patiently.

(b) One important requisite for conducting a reliable forensic evaluation may not have been adhered to in Mr. Ford's case. It is unclear if all of the available data concerning Mr. Ford's mental status were sufficiently considered.

(i) It is unclear whether Dr. Ivory considered the reports of previous psychiatrists or other available information in making his evaluation. It is clear that he did not have access to that information when he examined Mr. Ford. This lack of data could have seriously compromised the quality of his examination. It is also clear that Dr. Ivory does not refer to earlier psychiatric findings in his report.

(ii) While Dr. Mhatre's and Dr. Afield's evaluations both did take into account the history and previous evaluation of Mr. Ford's condition, both, as did Dr. Ivory's, failed to account for the facts contained in this history which were central to the forensic task as hand: whether Mr. Ford's delusional processes which, among other things, had led him to believe that he had won his case and could no longer be executed, were relevant to the issue of his incompetence, in that he failed to understand why he was to be executed or, as Dr. Kaufman put it, failed to understand "the purpose" of his execution. Dr. Kaufman had previously concluded that Mr. Ford was incompetent precisely because of these delusional

processes. Yet neither Dr. Ivory, Dr. Mhatre nor Dr. Afield dealt with this most crucial data in their reports.

8. In sum, therefore, I believe that the forensic evaluation of Mr. Ford by the 922.07 commission is unreliable because of its failure to be conducted in accord with the standard of care necessary for forensic psychiatric evaluation.

/s/ Seymour L.Halleck
SEYMOUR L. HALLECK

[Closing Jurat Omitted in Printing]

[Curriculum Vitae of Dr. Halleck Omitted in Printing]

[EXCERPT FROM APPENDIX TO PETITION FOR WRIT OF HABEAS CORPUS: AFFIDAVIT OF DR. GEORGE BARNARD, MAY 21, 1984]

[Opening Jurat Omitted in Printing]

George W. Barnard, M.D., being duly sworn according to law deposes and says:

1. Pursuant to a request by Richard H. Burr, III of counsel to the public defender, Fifteenth Judicial Circuit, West Palm Beach, Florida 33401, the following material was reviewed and considered in the process of evaluating Alvin Ford under Florida § 922.04, a. memorandum to Governor Bob Graham prepared by Attorney Dick Burr including correspondence of Alvin Ford over a time span of almost two years; b. transcript of testimony of psychiatrist David Taubel, M.D. at the trial of Alvin Ford; c. transcript of an attempted interview between Attorney Laurin Wollan along with paralegals Margaret Vandiver and Gail Rowland with Alvin Ford on December 15, 1983; d. phychiatric report of Jamal Amin, M.D. dated June 9, 1983 to Attorney Richard Burr; e. psychiatric report of Harold Kaufman, M.D. dated December 14, 1983, to Attorney Richard Burr; f. letter from the Office of the Public Defender to psychiatrist Walter Afield, M.D. concerning Alvin Ford, dated December 15, 1983; g. psychiatric report of Peter Ivory, M.D. to Governor Bob Graham re: Alvin Ford, dated December 20, 1983; h. psychiatric report of Umesh Mahtre, M.D. to Governor Bob Graham re: Alvin Ford, dated December 28, 1983; and i. psychiatric report of Walter Afield, M.D. to Governor Bob Graham re: Alvin Ford, dated January 19, 1983.

2. In his testimony at the trial of Ford, Dr. Taubel indicated that he thought Alvin Ford had minimal brain damage with dyslexia and that he had very consistent problems handling numbers and became easily frustrated. He indicated that Ford had been a responsible employee until a short time before his crime and after he had

become frustrated he had quit several jobs and subsequently felt depressed and had suicidal thoughts. Subsequently, he took cocaine and through its stimulus effect did not feel depressed and became involved in several robberies. Later he took out a $25,000.00 insurance policy but found out that he would have to have a natural death for his mother to collect the money.

3. In the memorandum prepared by Dick Burr for Governor Graham, Attorney Burr documents that Ford was sentenced to death in January 1975 and indicates as documented through a letter dated August 7, 1981, that there was no indication of a thought disorder. Subsequently, Alvin Ford's death warrant was signed in November 1981, and by December 5, 1981, in a letter Ford demonstrated material which I consider to be delusion of receiving messages from a radio staff and of thought broadcasting. In a letter of February 28, 1982, Ford had delusions regarding the Ku Klux Klan and the delusion that Ford could predict what will happen. His thought processes had disorganized with loosening of associations and delusion of a visual hallucinatory experience. He also expressed delusions of grandeur with God writing for him and a report of a visual hallucination. In his letter of April 17, 1982, Ford was preoccupied with the Ku Klux Klan and he was so busy with this preoccupation that he did not have time to read legal material from his attorneys. In the letter dated July 8, 1982, his delusional belief had spread to persecutory beliefs concerning former friends. He was saying that his former friend could cause him to get another murder charge. In his letter dated September 11, 1982, there was indication of delusions of persecution with threats and fear that his life was in danger and the belief that "they" were in the "pipe alley" at the prison. He also had auditory hallucinations hearing a female ask a man not to kill her plus there was indication he had delusions of grandeur, that he had written a book in which the authorship was changed and another person had received $680,000. He

had paranoid beliefs and delusions concerning his previous friends and he thought they were against him. There was indication he had olefactory hallucinations of decomposing bodies along with a visual hallucination of a gun and a delusion that his family was being murdered. In a letter of September 12, 1982, there was a delusion of his being in contact with President Reagan and in a letter dated October 22, 1982, there was a delusion that his family members had been taken hostage within the prison system. In the December 5, 1982, letter he had delusions that his grandmother was being held in the prison behind his cell as a hostage and in a March 28, 1983, letter he had multiple delusions of various people being hostage within the prison system. He had the belief that he had joined the Ku Klux Klan in order to get his family out of prison and there was indication of loosening of associations. In a letter of April 2, 1983, there was indication of auditory hallucinations of a female along with delusions of persecution and a belief in mindreading and thought broadcasting. He indicated some movement to give his own life in order to protect others. In the letter of April 1983, there was a delusion of grandeur and persecution concerning the hostage situation in the prison. In the letter of May 10, 1983, he still referred to the delusions of the hostages, delusions of grandeur about his own ability to fire officials with the final approval coming from President Reagan. In the letter of May 19, 1983, there was a delusion of grandeur involving national and international persons. In the letter of July 27, 1983, there were delusions of persecution regarding the hostage crisis and delusions of grandeur concerning his own ability to fire and place others under arrest and about marrying Patty Regan with 100 gifts per day being presented 100 days at the White House. In his last letter dated November 28, 1983, to his mother there was indication of delusion of grandeur in that he had aides and 10 wives. There was also indication of thought perservation concerning the word "one".

4. The report of Harold Kaufman, M.D., dated December 14, 1983, indicated that he had conducted an examination of Alvin Ford on November 3, 1983, and for the first 15 minutes Ford ignored him and subsequently Ford's thoughts became incoherent with delusions being expressed. His thoughts were not related and there was indication he had a flat affect. Ford expressed the delusional belief that he was free to go and it would be illegal for the state to execute him and that in turn if they did the executioner would be killed. There were delusions of grandeur that CBS was making a movie about him and the delusions of persecution that there were people in the pipe alley. There were reported auditory hallucinations that Ford could hear the people and delusions of grandeur that he had bought the prison. Ford's thoughts were rambling, disorganized and reflected delusional ideas. Ford indicated his belief to Dr. Kaufman that he, Ford, could not be executed because he had won his case in Ford v. State and he expressed the delusional belief that the state did not intend to execute him. Dr. Kaufman's diagnosis was schizophrenia, undifferentiated type, with delusions of disorganized ideas and verbal productions along with a flat affect. Dr. Kaufman expressed the belief that the possibility of Ford's lying or malingering was remote in his opinion. Dr. Kaufman thought that Ford understood the nature of the death penalty but lacked the mental capacity to understand the reasons it was imposed on him. He indicated that Ford believed that he owned the prison and could send mind waves to Governor Graham and President Reagan and through these could control and influence them in their decisions.

The report of Jamal Amin, M.D., dated June 9, 1983, reflected that since December 1981, Ford had become withdrawn, uncooperative, and had shown bizarre behavior. He reflected that Ford steadfastly had refused psychotropic medicines. Dr. Amin listed 12 significant findings concerning the mental status of Ford and these included

that Ford was no longer able to establish rapport as he previously had done, that there was indication of inappropriate affect in moods, that Ford's speech was more symbolic and showed indication of thought blocking, disorganization, and loosening of associations. There was thought insertion of irrelevant material so that Ford could not concentrate on relevant issues. There were delusional beliefs that his thoughts were controlled or influenced by outside sources and he expressed paranoid beliefs concerning the Ku Klux Klan. There was indication of auditory and visual hallucinations with the delusional belief that his mother had been killed in the prison system. Dr. Amin's diagnosis was paranoid schizophrenia with suicidal potential.

In the transcribed record of an attempted interview between Attorney Laurin Wollan, Jr., along with paralegals Margaret Vandiveer and Gail Rowland on December 15, 1983, Ford sat and glowered at them and at times made no responses. Later when he did respond, he was preoccupied with the word "one" and he persevered on this word and attached it to his irrelevant responses to questions put to him. For example, he said "killed one electric one break one Jesus one Mafia one God one Pope one threaten one leader one claim one stab one". All of his responses reflected a paranoid reference and outlook. He walked out on the interview and essentially poeple with whom he previously had had a trusting relationship were not able to make significant contact with him.

5. In his report to the Governor Peter Ivory, M.D. indicated that he along with Drs. Afield and Mahtre examined Ford for 35 minutes. Dr. Ivory indicated that later he talked with prison officers, viewed Ford's cell, and talked to a prison psychiatrist. Dr. Ivory did not indicate if he had reviewed any records provided by Attorney Burr concerning Ford. Dr. Ivory indicated that the interview was carried out with great difficulty since Ford responded in a "stylized, manneristic doggerel" and with

nonsensical answers such as he gave answers to questions with responses "beckon one, came one, Alvin one, Q one, king one." It should be noted that his preoccupation and dwelling on the word "one" was the same kind of irrelvant response that he had given to Attorney Wollan on December 15, 1983. Dr. Ivory then noted that it was necessary for him to depend on inferential deduction from nonverbal material to a large extent. It should be noted that if a subject does not have the ability to cooperate verbally with the psychiatrist and if therefore the psychiatrist must rely on nonverbal material, it greatly enhances the opportunity for error and misinterpretation on the part of the examining psychiatrist. Dr. Ivory indicated that by his ability to "read between the lines" of verbal responses which Ford did give that Dr. Ivory was of the opinion that Ford knew exactly what was going on but if one relies on the transcript of the interchange between the psychiatrist and Ford then there is great doubt, at least to this observer, that there was a rational interchange between Ford and the psychiatrist, because Ford gave irrelevant responses to questions put to him although the words he used had some association with the questions asked. Ford's responses do not indicate he had a rational understanding of the process and in fact some of Ford's responses were interpreted by Dr. Ivory to mean Ford maintained the belief that he would be spared by the angel of death and this delusional belief is in keeping with other delusional beliefs that Ford manifested to others in his correspondence. Dr. Ivory expressed his belief that because Ford had a clean and organized cell that this indicated to him that Ford could not have a disorganized mind or thought system in that insanity was not selective but pervasive. To this reviewer, it appears that Dr. Ivory is of the opinion that there is a significant correlation between disorganization of internal thoughts and the way that one keeps a room. From my understanding of the literature it is apparent that one can be highly disorganized internally and yet

keep a clean room as well as one can be highly disorganized in the way he keeps his room and yet be very organized and productive in his thought processes. Dr. Ivory gives his belief that Ford shows a "severe adaptational disorder". This diagnostic opinion does not reflect a diagnosis from D. S. M. III. Dr. Ivory expresses the belief that Ford's disorder although severe "seems contrived and recently learned". Although Dr. Ivory did not comment on whether or not he had reviewed materials provided by Attorney Richard Burr, he at least was given the materials and these materials, in my opinion, document severe though disturbance with delusions as early as December 5, 1981, so there is nothing recent about the disorder and if they are contrived, Ford has expressed this delusional belief system to a number of different parties in a consistent manner and has not done so just for examining psychiatrists.

6. The report of Dr. Umesh Mahtre indicated that most of Ford's responses to questions were bizarre and were gibberish talk but that Ford maintained good eye contact. Mahtre found Ford to have a blunted affect. There is no clear indication of exactly what the three examiners did in the way of a mental status examination but Dr. Mahtre indicated that doctors relied on prison guards who said that Ford's gibberish talk and bizarre behavior started after all legal attempts had failed yet as previously mentioned there is documentation that Ford's thought processes reflected a disturbance with delusional ideas as early as December 5, 1981, shortly after his death warrant was signed in November 1981. Dr. Mahtre said the guards indicated that Ford had become more depressed after Sullivan had been executed. Dr. Mahtre gave his diagnostic opinion that he felt Ford showed "psychosis with paranoia". By definition, if a person has a psychosis there is a break with reality. Dr. Mahtre indicated that Ford "appears" to understand what is happening around him but Dr. Mahtre did not give the

basis for this inferential statement. Dr. Mahtre presents no documentation for his opinion as to why he believes Ford understands the nature and effects of the death penalty and why it is imposed if Ford is psychotic. Dr. Mahtre recommended that Ford receive anti-psychotic medicine but did not mention whether or not he was aware of the fact that Ford consistently refused to take anti-psychotic medicine. Dr. Mahtre did not say if he believed that Ford was incompetent to refuse medicine and, therefore, it could be given to him against his will.

7. In his report dated January 19, 1984, Dr. Walter Afield stated that his examination consisted of a complete mental status examination yet he did not document what his examination consisted of. In his report Dr. Mahtre had said that orientation and memory of Ford were not tested so it is not readily apparent exactly what Dr. Afield considers to be necessary in a "complete" mental status examination. Dr. Afield said that in his opinion Ford does not present a classical description of a psychiatric illness so he makes no official diagnosis other than to say that in his opinion he believes Ford to be psychotic and to be severely disturbed. In spite of Dr. Afield's believing that Ford was psychotic, Dr. Afield went on to express the conclusionary statement that he felt Ford did understand the nature of the death penalty and that he may be executed but he presents no documentation of data on which he reaches this conclusionary belief.

8. In his letter to the three examining psychiatrists dated December 15, 1983, Attorney Richard Burr clearly documented that Ford had the delusional belief that he had won his case in Ford v. State and had deprived the State of lawful authority to execute him. Attorney Burr went on to outline for the psychiatrists how he believed Ford had deteriorated across time with the development of delusional beliefs as early as February 1982. These delusional beliefs were persecutory and grandiose in nature. Later in November 1982, Ford began refusing to see his

attorneys. Furthermore, Attorney Burr expressed his belief that Ford had continued to be paranoid and suspicious of others. He said to the psychiatrists that Ford sometimes refused to talk and predicted that this may happen in their examination and encouraged them if it did to be patient with Ford and persist so that once he opened up to them his pathological thought processes would become readily apparent. In spite of this precautionary note and encouragement by Attorney Burr for the psychiatrists to be patient and take time with Ford, the psychiatrists spent 35 minutes in their examination of him. None of the three psychiatrists appointed by the Governor commented on or made note of the evidence pointing toward Ford's delusional belief system over a period of about two years. None of them dealt with Ford's delusion that he had won his case and could not be executed.

9. The materials which I reviewed give evidence of documenting symptoms in Ford which are consistent of the diagnosis of schizophrenia, paranoid type. These symptoms include delusions of persecution, delusions of grandeur, thought blocking, thought insertion, thought broadcasting, flat affect, loosening of associations and disturbance of speech with word gibberish. In the psychiatric interview conducted by the three examiners appointed by the Governor, Ford was uncooperative and he gave them few meaningful verbal responses so that they relied heavily on his nonverbal productions and their ability to read between the lines for what he might be meaning with his nonsensical replies to their questions. In my opinion, the three examiners give conclusionary opinions about Ford's competency to be executed without documenting in a satisfactory manner their evidence or facts upon which their inferences are based. As a result, in my opinion, the factfinder and, in this case, Governor Graham and/or the Court is left with the dilemma of depending on conclusionary belief statements by the psychiatrists that Ford is competent to be executed without

adequate documentation by the psychiatrists so that the factfinder must rely on the credentials of the psychiatrists rather than their data. In my opinion, this leaves the factfinder in a very unsatisfactory position when a man's life is at stake and in the absence of additional checks and balances is not in keeping with my understanding of due process.

/s/ George W. Barnard
GEORGE W. BARNARD, M.D.

[Closing Jurat Omitted in Printing]

[Curriculum Vitae of Dr. Barnard Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

[Title Omitted in Printing]

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Respondent, Louie L. Wainwright, as Secretary of the Florida Department of Corrections, hereby responds in opposition to the instant petition for writ of habeas corpus as follows:

INTRODUCTION

This pleading is being filed in conjunction with respondent's response in opposition to petitioner's application for a stay of execution. Both pleadings are being drafted on an anticipatory basis; that is, due to the abbreviated time schedule, respondent has not yet received any of petitioner's pleadings. Therefore, both responses have been drafted based upon what counsel anticipate will be raised in the pleadings to be filed by petitioner.

I

COURSE OF PRIOR PROCEEDINGS AND BASIS OF DETENTION

On July 26, 1974, petitioner was charged by indictment with the first-degree murder of police officer Dimitri Walker Ilynkoff during the course of an attempted robbery. On December 17, 1974, petitioner was convicted of murder in the first degree and, following a jury recommendation of the death penalty, petitioner was sentenced to death on January 6, 1975.

The judgment and sentence were affirmed by the Florida Supreme Court. *Ford v. State*, 374 So.2d 496 (Fla. 1979), and the United States Supreme Court denied certiorari. *Ford v. Florida*, 445 U.S. 972 (1980).

Petitioner was one of one hundred twenty-three death row inmates who filed a petition for writ of habeas corpus in the Florida Supreme Court, challenging that court's alleged practice of receiving non-record material in connection with its review of capital cases. The supreme court dismissed that petition, *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), *cert. denied*, 454 U.S. 1000 (1981).

A death warrant was signed by the Governor of Florida requiring that petitioner be executed by December 11, 1981, the execution itself having been scheduled for December 8, 1981. Petitioner thereafter filed a motion for post-conviction relief pursuant to *Fla.R.Crim.P.* 3.850 in the state trial court, which motion was eventually denied after an evidentiary hearing held on the issue of the alleged ineffective assistance of trial counsel, and petitioner's application for a stay of execution in conjunction with that proceeding was also denied. Petitioner thereafter appealed the denial of his motion for post-conviction relief to the Florida Supreme Court, and filed an original petition for a writ of habeas corpus in that court alleging that his counsel on direct appeal had been ineffective. Those two matters were consolidated, and shortly thereafter the Florida Supreme Court affirmed the denial of the motion for post-conviction relief, denied the petition for a writ of habeas corpus, and denied petitioner's request for a stay of execution. *Ford v. State*, 407 So.2d 907 (Fla. 1981).

Petitioner filed his first petition for a writ of habeas corpus in this court on December 3, 1981, and after hearings held on December 4, 6 and 7, 1981, this court denied all relief, including petitioner's request for a stay of execution, in a written order detailing the court's findings of fact and conclusions of law. However, that evening a stay was entered by the United States Court of Appeals for the Eleventh Circuit. The appellate court granted respondent's request for an expedition of the appeal, and initially a divided panel of that court affirmed this court's rulings. *Ford v. Strickland*, 676 F.2d 434 (11th Cir.

1982). Rehearing on *en banc* was granted, oral argument was entertained before the court *en banc*, and eventually a lengthy opinion was filed which again affirmed this court's rulings. *Ford v. Strickland*, 696 F.2d 804 (11th Cir. 1982). Certiorari was thereafter denied by the United States Supreme Court. *Ford v. Strickland*, —— U.S. ——, 104 S.Ct. 201 (1983).

On April 30, 1984, the Governor of Florida signed a second death warrant in petitioner's case; the warrant will expire on June 1, 1984 at 12:00 noon, and the execution itself is presently scheduled for Thursday, May 31, 1984 at 7:00 a.m. On Monday, May 21, 1984, petitioner filed a motion for hearing and appointment of experts for determination of competency to be executed and a motion for a stay of execution in the state trial court (Exhibit A). His motions were denied by the state trial judge on that same day (Exhibit B). Thereafter, petitioner applied for the same relief to the Florida Supreme Court (Exhibit E), and also filed an original petition for writ of habeas corpus in the Florida Supreme Court alleging that the jury had been erroneously instructed during the penalty phase of his trial (Exhibit C). Responsive pleadings were filed (Exhibits D and F), and oral argument was heard by the Supreme Court on May 25, 1984. On that same date the Florida Supreme Court denied the application for appointment of experts, denied the petition for writ of habeas corpus, and denied the application for a stay of execution (Exhibit G).

This proceeding follows.

APPLICABILITY OF RULE 9(b)

Rule 9(b) of the Rules governing Section 2254 Cases in the United States District Courts 28 U.S.C. § 2254 (1977) provides as follows:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Respondent submits that it is the latter section of Rule 9(b) that applies to Petitioner's claims, and that this petition should be dismissed as an abuse of the writ. *See Potts v. Zant*, 638 F. 2d 727, 740 (5th Cir. Unit B), *cert. denied*, 454 U.S. 877 (1981).

Where new grounds are raised in a second or successive petition the burden is on the government to specifically allege that the Petitioner is abusing the writ by having omitted these grounds in his earlier petition. *Price v. Johnston*, 334 U.S. 266, 292 (1948). As the Fifth Circuit Court of Appeals recently explained in *Jones v. Estelle*, 722 F.2d 159, 164 (5th Cir. 1983) (en banc), the initial pleading burden is met if the government "notes Petitioner's prior writ history, indicates the claims appearing for the first time in the successive petition, and affirms its belief that Petitioner is abusing the writ in a matter proscribed by Rule 9(b)." Once the government has met its burden of pleading abuse of the writ, the Petitioner has the "burden of answering the allegation and of *proving by a preponderance of the evidence that he has not abused the writ*," *Jones v. Estelle, supra*, 722 F. 2d at 164 *quoting Price v. Johnston, supra* 334 U.S. at 292 (emphasis original).

The court in *Jones* further explained that the governing principles

> boil down to the idea that a petitioner can excuse his omission of a claim from an earlier writ if he proves he did not know of the "new" claims when the earlier writ was filed. The inquiry is easily anwered when the claim has been made possible by a change in the law since the last writ or a development in facts which was not reasonably knowable before. 722 F. 2d at 165.

As the court noted, the objective of the procedural rules is to

> preserve the proper use of the writ of habeas corpus to win review of unlawful action, while recognizing that 'the advancing of grounds for habeas corpus relief in a one-at-a-time fashion when the evidence is available which would allow all grounds to be heard and disposed of in one proceeding, is an intolerable abuse of the Great Writ.' *Id.* at 164-165 (citations omitted).

The principles of law enunciated in *Jones* are highly significant to the instant petition, because the Fifth Circuit held that abuse of the writ may properly be found where a Petitioner was represented by competent counsel in a prior federal habeas corpus proceeding; where, as in the instant case, the Petitioner was not proceeding *pro se* in the first federal habeas case, a Rule 9(b) bar is not limited to those claims that the Petitioner himself deliberately and knowingly withheld. Rather,

> the inquiry into excuse for omitting a claim from an earlier writ will differ depending upon whether Petitioner was represented by counsel in the earlier writ prosecution. Representation by competent counsel has an immediate impact upon the quality of proof necessary to prove an excuse for omitting a prior claim. With counsel the inquiry is not solely the awareness of a Petitioner, a layman, but must include that of his competent counsel. *When a Peti-*

tioner was represented by competent counsel in a fully prosecuted writ he cannot by testimony of his personal ignorance justify the omission of claims when awareness of those claims is chargeable to his competent counsel. 722 F. 2d at 167.

Another factor which must be considered by this Court in determining whether there has been an abuse of the writ is the timing of the presentation of the claim. *Autry v. Estelle*, 719 F. 2d 1247, 1250 (5th Cir. 1983). As Justice Powell stated in *Woodward v. Hutchins*, —— U.S. ——, 104 S. Ct. 752, 78 L. Ed. 2d 541, 543 (1984) "this is another capital case in which a last minute application for a stay of execution and a new petition for writ of habeas corpus relief having been filed with *no explanation as to why the claims were not raised earlier* or why they were not all raised in one petition. It is another example of abuse of the writ."

In the instant case, the Petitioner filed his first petition for writ of habeas corpus in this Court on December 2, 1981. *Ford v. Wainwright*, Case No. 81-6663-CIV-NCR. On December 7, 1981, this court orally denied the petition, and after a stay of execution was granted by the Eleventh Circuit on that same day, this Court on December 10, 1981, entered its written order denying the petition. In the first petition, Petitioner did not raise any of the issues which he now raises in the present petition. However, it must be noted that in the evidentiary hearing on December 7, 1981, before this Court, the Petitioner presented the testimony of Dr. Jamal Amin, one of the psychiatrists upon whose opinion he relies on to prove that Petitioner is not incompetent to be executed.

As this Court may recall, the gist of Dr. Amin's testimony was that trial counsel was ineffective for having called Dr. Taubel to testify during the sentencing phase because Dr. Taubel, a white psychiatrist did not have sufficient socio-cultural compatibility with the Petitioner to properly present the psychiatric testimony. However,

Dr. Amin did testify that from his interview with the Petitioner in the latter part of July, or first part of August, 1981, that he would classify the Petitioner as having an extreme mental and emotional disturbance which contributed to his actions at the time of the murder (H.C.T. 98),[1] and that in his opinion the Petitioner was acting under a 'violent dissociative reaction whereby someone can in the course of a violent incident be completely out of control and in a psychotic state." (H.C.T. 105).

After this Court denied the first petition for writ of habeas corpus, the Petitioner appealed to the Eleventh Circuit, en banc, in which the dismissal of the petition was affirmed, *Ford v. Strickland*, 696 F. 2d 804 (11th Cir. 1983) (en banc), and after denial of certiorari by the United States Supreme Court, *Ford v. Strickland*, —— U.S. ——, 104 S. Ct. 201 (1983), the cause was remanded to this Court for consideration of the effect of *Barclay v. Florida*, —— U.S. ——, 103 S. Ct. 3418 (1983) on the issue of whether the trial judge's erroneous reliance upon certain aggravating circumstances was properly determined by the Florida Supreme Court to be harmless error. The mandate from the Eleventh Circuit was issued on October 6, 1983. From that date until March 22, 1984, this Court had jurdisdiction to consider any additional claims which were ripe for federal habeas review.[2] *See, e.g., Arango v. Wainwright*, 716 F.2d 1353 (11th Cir. 1983) (motion for rehearing pending).

Petitioner has alleged in this petition that his current mental problems began around December 5, 1981, and he has consistently deteriorated through December 19, 1983, when Petitioner was examined by the three psychiatrists

---

[1] "H.C.T." refers to transcript of habeas corpus hearing before this Court on December 7, 1981.

[2] On March 22, 1984, after finding that the resolution of *Barclay v. Florida, supra*, was in accordance with the Eleventh Circuit's affirmance of this Court's decision in the first petition, this Court dismissed the petition.

appointed by Governor Graham pursuant to Executive Order 83-197. Yet despite all the letters and other communication by the Petitioner to counsel, and the reports of Dr. Amin and Dr. Kaufman, counsel did not see fit to challenge Petitioner's compentency through the state or federal courts until May 21, 1984, ten days before his scheduled execution. The Respondent submits that Petitioner could have brought the substantive due process and eighth amendment claims on the issue of insanity *vel non* barring execution, prior to the governor's implementation of the statutory procedures of Section 922.07, *Florida Statutes*. An issue as to post-conviction insanity becomes ripe for determination upon the state court sentence of death. *See generally Goode v. Wainwright*, —— F. 2d ——, Eleventh Circuit, Case No. 84-3224, slip opinion filed April 4, 1984. Furthermore, the showing of changed conditions does not mean that post-conviction insanity can be held back as an issue until the eve of execution and then raised for the first time. *Goode v. Wainwright, supra*, slip opinion at 4.

Respondent submits that as in *Goode v. Wainwright, supra*, Petitioner is barred from raising the issue of the constitutionality of the procedures in Section 922.07, because of abuse of the writ. In his first federal habeas corpus petition, Petitioner contended that trial counsel was incompetent for having Dr. Taubel testify. In support of this allegation, Petitioner presented the testimony of Dr. Amin, who stated that Petitioner suffered from an extreme mental and emotional disturbance, such as to be in a psychotic state at the time of the murder. This Court rejected the contention as to ineffective assistance of counsel. Petitioner's mental state, as in *Goode*, has been an issue known to Petitioner for the past two and one half years. Yet, now, Petitioner claims that there is new evidence that Petitioner has become incompetent. This claim must be rejected.

In *Hutchins v. Woodward, supra*, the Supreme Court rejected a "new claim" that there was *new* evidence that Hutchins was insane, stating:

> A pattern seems to be developing in capital cases of multiple review in which claims that could have been presented years ago are brought forward—often in a piecemeal fashion—only after the execution date is set or becomes imminent. Federal courts should not continue to tolerate—even in capital cases—this type of abuse of the writ of habeas corpus. 78 L. Ed. 2d at 544-545.

Thus, Respondent submits that because Petitioner's mental state has been an issue since 1981, the issue raised herein regarding the alleged unconstitutionality of the procedures to determine Petitioner's alleged incompetency to be executed should be deemed an abuse of the writ.

• • • •

DETERMINATION OF SANITY TO BE EXECUTED AND THE SCOPE OF FLA.STAT. 922.07

The contention of petitioner that, separate and apart from the procedure outlined in § 922.07 *Fla.Stat.* there is a common law right to a determination of a prisoner's competency to be executed, which as a corollary entitles him to certain due process guarantees, is erroneous. It is true that the early state judicial decisions recognized such right, and provided that application for a determination of sanity to be executed should be addressed to the trial court, "there being no statute covering the subject." *Ex Parte Chesser*, 93 Fla. 291, 111 So. 720, 721 (1927); *State ex rel Debb v, Fabisinski*, 111 Fla. 454, 152 So. 207, 211 (1933). In *Hysler v. State*, 136 Fla. 563, 187 So. 261 (1939), the court reaffirmed *ExParte Chesser*, *supra*, and again held that on the question of sanity to be executed, application should be made to the trial court for a determination.

Following the decision in *Hysler*, the legislature enacted what is now § 922.07, *Fla.Stat.*, which sets forth the procedings to be followed by the Governor when a person under sentence of death appears to be insane.

It is an accepted rule of statutory construction that the legislature is presumed to be acquainted with judicial decisons on the subject concerning which it subsequently enacts a statute. *Mains Ins. Co. v. Wiggins*, 349 So.2d 638, 642 (1 DCA Fla. 1977), *Bermudez v. Fla. Power and Light Co.*, 433 So.2d 565, 567 (3 DCA Fla. 1983). Aware that previously applications for determinations of sanity to be executed were to be made to the trial court, the legislature enacted a statute which decreed this function would be henceforth fulfilled by the Governor. This statute is now the controlling law within its sphere of operation. *DeGeorge v. State*, 358 So.2d 217, 220 (4th DCA Fla. 1978). The Governor's authority to determine sanity, with the aid of an appointed commission of three psychiatrists as outlined in § 922.07, is entirely appropriate. *Solesbee v. Balkcom*, 339 U.S. 9 (1950). Thus Florida has accepted the legal proposition that an insane person cannot be executed and has provided through § 922.07, the means to invoke it.

In *Goode v. Wainwright*, —— So.2d —— No. 65,098 (Op. filed 4-2-84), the Florida Supreme Court addressed the issue, agreed "that an insane person cannot be executed," (slip op. at 3), and held that § 922.07 sets forth "the procedure to be followed when a person under sentence of death appears to be insane. The execution of capital punishment is an executive function and the legislature was authorized to prescribe the procedure to be followed by the Governor in the event someone claims to be insane." Thus in *Goode* the Court held under § 922.07 the Governor can make the determination; *Goode* does not stand for the proposition that the issue of sanity to be executed can be raised independently in the state judicial system.

The petitioner argues that execution of an insane person would violate the Eighth Amendment. Assuming *arguendo*, without addressing the merits, that this is true, there is no need for this court to decide the issue because Florida law does not provide for executing insane per-

sons. Moreover, the petitioner's assertion of insanity has already been resolved against him by the Governor.

The fact that the determination of sanity to be executed is, pursuant to Florida law, made by the Governor, is in accord with controlling precedent of the United States Supreme Court. In *Nobles v. Georgia*, 168 U.S. 515 (1897) the court held the question of insanity after verdict did not give rise to an absolute right to have the issue tried before a judge and jury, but was addressed to the discretion of the judge. The court concluded the manner in which the sanity question was to be determined was purely a matter of legislative regulations. Subsequently, in *Solesbee v. Balkcom*, 339 U.S. 9 (1950), the court noted it was unnecessary to decide if execution of an insane person is "cruel and unusual punishment" because Georgia did not approve the practice of executing insane persons, and it held the Georgia procedure whereby the Governor determined the sanity of an already convicted defendant did not offend due process:

> We are unable to say that it offends due process for a state to deem its Governor an "apt and special tribunal" to pass upon a question so closely related to powers that from the beginning have been entrusted to governors. And here the governor had the aid of physicians specially trained in appraising the elusive and often deceptive symptoms of insanity. It is true that governors and physicians might make errors of judgment. But the search for truth in this field is always beset by difficulties that may beget error. Even judicial determination of sanity might be wrong.
>
> • • • •
>
> To protect itself society must have power to try, convict, and execute sentences. Our legal system demands that this governmental duty be performed with scrupulous fairness to an accused. We cannot say that it offends due process to leave the question of a convicted person's sanity to the solemn respon-

> sibility of a state's highest executive with authority to invoke the aid of the most skillful class of experts on the crucial questions involved.

Finally, in *Caritativo v. California*, 357 U.S. 549 (1958), the court affirmed on the authority of *Solesbee v. Balkcom, supra.* In his concurring opinion, Justice Harlan approved the California procedure whereby the prison warden was given the initial responsibility to preliminarily determine a condemned prisoner's sanity, *ex parte*, as not violative of due process.

It is apparent from these decisions that in the post-conviction post-sentencing stage of a capital proceeding, the determination of a prisoner's sanity may be made by the Governor as provided by § 922.07. The petitioner's argument that *Solesbee* and the other decisions are no longer good law is not supported by the cases he cites: *McGautha v. California*, 402 U.S. 183 (1971); *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gardner v. Florida*, 430 U.S. 349 (1977); for these cases do not affect the validity of Solesbee's holding that sanity for execution can be determined by the Executive.[1] The continued validity of *Solesbee* was recognized in *Goode v. Wainwright*, —— So.2d ——, No. 65,098 (Op. filed 4-2-84) where it was cited at length (slip. op at 4-5), and in *Goode v. Wainwright*, —— F.2d —— (11th Cir. 1984) No. 84-3224, Op. filed 4-4-84 (slip op. at 2-3), where it was held the statute meets minimum due process standards.

The petitioner asserts the sanity test for execution should be the same as for competency at the time of trial. The respondent maintains the standard set forth in § 922.07(1), *Fla.Stat.*, which is whether the condemned

---

[1] None of these cases have held that execution *per se* violates the Eighth Amendment; the procedure of how the death penalty is imposed has been the issue, and it has been decided in the context of the Eighth Amendment as applied to the states through the Fourteenth. Therefore, the resolution of *Solesbee* on due process grounds satisfies the petitioner's Eighth Amendment argument.

man "understands the nature and effect of the death penalty and why it is to be imposed upon him," is sufficient. The third prong suggested by petitioner, that the prisoner possesses sufficient understanding to be aware of any facts that may make his punishment unjust and have the ability to convey such information to his counsel is taken from the compentency to stand trial standard set forth in *Dusky v. United States*, 362 U.S. 402 (1960), *i.e.* "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rationale understanding." In the present posture of this case—post conviction, post sentence, post appeal, post collateral attack—this suggested standard is inappropriate. The petitioner has already had full access to the state and federal courts. *See, Ford v. State*, 374 So.2d 496 (Fla. 1979), *cert. denied*, 445 U.S. 972 (1980); *Ford v. State*, 407 So.2d 907 (Fla. 1981); *Ford v. Strickland*, 696 F.2d 804 (11th Cir. 1983) (en banc); *cert. denied*, —— U.S. ——, 78 L.Ed.2d 176 (1983). He has not been deprived of the opportunity to litigate any and all issues arising from his 1974 trial.

The present allegation that the petitioner's competency must be evaluated in terms of whether he is able to supply new information which would warrant still more litigation is absurd in view of the history of this case. Like Arthur Goode, the petitioner *sub judice* "has exercised his right to use the full processes of the judicial system." *Goode v. Wainwright*, —— So.2d ——, No. 65,098 (Op. filed 4-2-84) (slip op at 3). The competency standard for purposes of determining sanity to be executed set forth in § 922.07(1), *Fla.Stat.*, is legally and constitutionally sufficient.[2]

---

[2] In *Gray v. Lucas*, 710 F.2d 1048, 1054 (5th Cir. 1983), the court merely noted "both parties in the present case are content to rest on this test." In did *not* decide that the prisoner's ability to know facts which would make the punishment unjust and to communicate them to his attorney was a requisite element of the determination of sanity to be executed.

The petitioner's argument that he is entitled to the same procedural protections that are applicable to a claim of incompetency to stand trial was rejected by the Florida Supreme Court in *Goode v. Wainwright*, —— So.2d ——, (Fla. 1984), No. 65,098 (Op filed 4-2-84). The same basic contention was raised in *Goode*, and the court determined therein that "The Governor has the inherent right to grant a stay of execution and to make a determination as to the sanity of an individual who has been sentenced to death. We find no abuse of authority, nor do we find any denial of due process." (slip op at 5).

As respondent has discussed, § 922.07 *Fla.Stat.* by its terms outlines the "proceedings when [a] person under sentence of death appears to be insane," and it provides the exclusive means by which the sanity of a condemned prisoner is to be determined. It does not coexist with any separate right to a judicial determination.[3] The statute, which delegates the function of determining sanity in these circumstances to the Governor, is akin to the clemency power which likewise reposes exclusively in the Chief executive. *Sullivan v. Askew*, 348 So.2d 312 (Fla. 1977); *Spinkellink v. Wainwright*, 578 F.2d 582, 617-19 (5th Cir. 1978). Since in *Goode* the Florida Supreme Court held the statute comports with due process and the Eleventh Circuit agreed, *Goode v. Wainwright*, —— F.2d ——, (11th Cir. 1984) No. 84-3224 (op filed 2-4-84) that ends the matter.

The Governor's determination that the petitioner is competent to be executed is supported by the reports of the psychiatrists who examined the petitioner. Dr. Ivory reported:

> I formed the opinion that the inmate knows exactly what is going on and is able to respond promptly to

---

[3] That portion of the Eleventh Circuit's *Goode* decision, cited *infra*, which appears to permit judicial litigation of mental competency is mere *dicta*, as that issue was not squarely before the court. The court's opinion was grounded on a finding that *Goode* has abused the writ.

external stimuli. In other words, in spite of the verbal appearance of severe incapacity, from his consistent and appropriate general behavior he showed that he is in touch with reality . . . This inmate's disorder, although severe, seems contrived and recently learned. My final opinion, based on observation of Alvin Bernard Ford, on examination of his environment, and on the spontaneous comments of group of prison staff, is that the inmate does comprehend his total situation including being sentenced to death, and all of the implications of that penalty.

Dr. Mhatre reported:

The conversation with the guards at Florida State Prison who have been working with Mr. Ford, furnished the following information. His jibberish talk and bizarre behavior started after all his legal attempts failed. He was then noted to throw all his legal papers up in the air and was depressed for several days after that. He especially became more depressed after another inmate, Mr. Sullivan, was put to death and his behavior has rapidly deteriorated since then. In spite of this, Mr. Ford continues to relate to other inmates and with the guards regarding his personal needs. He has also borrowed books from the library and has been reading them on a daily basis. A visit to his cell indicated that it was neat, clean and tidy and well organized. . .

It is my medical opinion that Mr. Ford has been suffering from psychosis with paranoia, possibly as a result of the stress of being incarcerated and possible execution in the near future. In spite of psychosis, he has shown ability to carry on day to day activities, and relate to his fellow inmates and guards, and appears to understand what is happening around him. It is my medical opinion that though Mr. Ford is suffering from psychosis at the present time, he has enough cognitive functioning to under-

> stand the nature and the effects of the death penalty, and why it is to be imposed upon him.

Dr. Afield's opinion is:

> . . . Although this man is severely disturbed, he does understand the nature of the death penalty that he is facing, and is aware that he is on death row and may be electrocuted. The bottom line, in summary is, although sick, he does know fully what can happen to him.

The petitioner's assertion of insanity, based on Dr. Kaufman's report, presents nothing more than an issue of fact which has already been resolved against him by the Governor of Florida following the statutorily prescribed fact finding procedure which entailed an examination of the petitioner by three psychiatrists, as discussed above. That factual determination is non-reviewable in a federal habeas corpus proceeding. *Solesbee v. Balcom, supra*; *Sumner v. Mata*, 449 U.S. 539 (1981); *Goode v. Wainwright*, USDC No. 84-68-Civ-F&M-10 (M.D. Order entered 4-4-84).

CONCLUSION

THEREFORE, respondent respectfully requests that the instant petition for writ of habeas corpus and related motions be denied.

Respectfully submitted,

[Counsel for Respondent]

[Names/Addresses of Counsel Omitted in Printing]

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

[Title Omitted in Printing]

TRANSCRIPT OF HEARING BEFORE THE HONORABLE NORMAN C. ROETTGER, JR.

* * * * *

[3] MR. BURR: Your Honor, I would like to address, first of all, the competency issue and the facts of competency and the abuse of the writ question related to competency because those two go hand in hand; and certainly abuse of the writ is a special issue that we have to get over before there is anything else to talk about with respect to the competency issue. So I will limit my opening [4] remarks to what we submit is the right of Alvin Bernard Ford not to be executed when he is incompetent.

THE COURT: Well why are we arguing about that? Isn't the law fairly settled that executions don't take place if someone is incompetent?

MR. BURR: We submit that it is.

THE COURT: Why don't you address yourself to something that might be in issue?

MR. BURR: Well I think abuse of the writ is in issue. It certainly is an issue that the State has raised.

THE COURT: So you are addressing the question not on whether or not an incompetent person can be executed but whether or not there's abuse of this writ.

MR. BURR: That is correct.

THE COURT: Very well.

Please proceed.

MR. BURR: As I said the facts of competency and the question of abuse are intertwined.

The most important thing to note about abuse of the writ from our perspective and I think from the Court's perspective is that Alvin Ford did not become incompetent in the estimate of Counsel and observers of Mr. Ford until October of 1983—

THE COURT: Hasn't the State contended differently?

MR. BURR: The State does contend differently and [5] to the extent that it rests on a different interpretation of facts I think the facts would have to be resolved in a hearing; but I don't think that the facts which genuinely go to any issue arose are in dispute because I don't think the State has been able to put them in dispute.

THE COURT: Well that psychiatrist testified before me nearly three years ago.

MR. BURR: That's right; but he said nothing about competency. His testimony was solely related to whether at the time of the incident Mr. Ford was laboring under any extreme mental or emotional disturbance, and he postulated that he was. At that point in time we made no claim about his current competency. There was no claim made about his competency at trial. There was no claim ever made about Alvin Ford's competency.

THE COURT: No. But could you have.

MR. BURR: In my estimation—

THE COURT: In December of 1981 when I had a hearing in this matter, evidentiary hearing.

MR. BURR: Absolutely not. I had no reason on earth to believe Alvin Ford was incompetent. He could speak with me about the issues in the case and explained what went on in the incident without any degree of difficulty at all.

THE COURT: But you were not his Counsel then, were you?

[6] MR. BURR: I became his Counsel in the course of that proceeding and had the opportunity while he was in Fort Lauderdale for that proceeding to spend a good deal of time with him. There was no question in my mind of competency.

THE COURT: Wait a minute. Let's go into that a little bit.

You became his Counsel during the course of that proceeding?

MR. BURR: I appeared with Mr. Wollan from Tallahassee.

The Friday evening when we first appeared before Your Honor, Mr. Wollan was the only Counsel and at that point shortly after the proceeding started that Friday night, Your Honor admitted me to assist in representation of Mr. Ford.

THE COURT: When did your co-Counsel leave?

MR. BURR: He is still co-Counsel.

THE COURT: He's not here.

MR. BURR: He's not here. Since that day, since that time, my circumstances have changed. I have become a member of the Public Defender's Office for this State Judicial Circuit and that office has taken over the representation of Mr. Ford along with Mr. Wollan.

THE COURT: Very well.

Please proceed.

MR. BURR: From December of 1981 on, there began [7] to be some deterioration of Mr. Ford. The deterioration was hardly noticeable at first. In late December, early January, he began talking about his ability to communicate with the staff of the radio station in Jacksonville. Seemed quirky but who knew what that meant. Sometime later, in late February of 1982, Mr. Ford began what became a genuine obsession with the Ku Klux Klan. Mr. Ford became convinced that in late February '82, that a Ku Klux Klan had burned a house in Jacksonville where a black family had been killed and he attempted to communicate that message to a number of people through letters. He says that he talked with the staff of the radio station about his insight. He wrote one very, very long letter, which is in habeas petition, explaining how he got the insight about the Ku Klux Klan's role in that arson.

Again, we knew about that. We got copies of the letters that he wrote. But there was at that point nothing to suggest that whatever was happening with Mr. Ford was intertwined with his understanding of his case.

He continued. Several months later in 1982 he began to think that the Ku Klux Klan had members serving as correctional officers at Florida State Prison. He thought that these officers were put there to harass him and to make him commit suicide. He believed that these officers were holding people hostage and there is what he calls a [8] "pipe alley" a tunnel behind his cell at Florida State Prison where he thought hostages were being held. He describes in his letters the torture of the hostages and torture of himself emotionally again by what was going on. Again, strange stuff. Certainly an indication that he might be becoming pyschotic. But when we visited with Mr. Ford he was able to talk with us about his case, he had an understanding where the case was in the Courts and he seemed to be becoming more concerned about what he called the hostage crisis than about anything else. But we were still able to communicate with him.

That proceeded through 1982 pretty much in that fashion with the delusions growing in scope and with more people being brought into the delusions; the number of hostages that he thought were being held increased. He began writing more impassioned letters to people that he thought had the power to help him.

THE COURT: What did you do about that?

MR. BURR: Well we talked, we tried to see Mr. Ford as often as we could, and we engaged the services of—

THE COURT: "We"? "We"?

MR. BURR: "We," meaning Counsel for Mr. Ford.

At that point in the fall of 1982 I was in West Palm Beach and my colleagues in the Public Defender's Office and I attempted to counsel with Mr. Ford. We also obtained [9] the services of a psychiatrist, Doctor Jamal Amin who testified before, has been seeing Mr. Ford all along and was able to see Mr. Ford through about August of 1982 and at that point Mr. Ford began to think that Doctor Amin was one of his persecutors, began to think that he was in conspiracy with the Ku Klux Klan to hold

hostages and drive him crazy so he refused to see Doctor Amin in about August of '82. Doctor Amin continued consulting with us to help us in our dealings with Mr. Ford to try to bring some sense of reality to him. But by January of 1983 it was clear that we needed another psychiatrist to try to get in to see Mr. Ford.

At that point we asked for the assistance of a psychiatrist from Washington D.C. named Harold Kaufman, and from that point through the present Doctor Kaufman has consulted with us and has seen Mr. Ford on a couple of occasions. He has also reviewed hours of taped interviews with Mr. Ford.

THE COURT: Why would you go to Washington D.C. for a psychiatrist?

MR. BURR: Well, we were looking—

THE COURT: Is he one who was going to say what you wanted him to say?

MR. BURR: We had no reason to know what he would say.

THE COURT: I mean some psychiatrists have that [10] reputation both ways.

MR. BURR: Why sure. I did not know anything about Doctor Kaufman's reputation except that he was, had been for a number of years a consultant with the D.C. Court of Appeals, the D.C. Circuit Court of Appeals on psychiatric issues. He was also himself a lawyer and in our situation that was important because in late 1982 Mr. Ford began to suggest that he wanted to drop his appeals in his case. We at that point thought that he might be not competent to make an intelligent choice about dropping his appeals and that in fact had reason to believe that he had reason to do that as a way of ending the hostage crisis. So we got Doctor Kaufman's assistance for that reason initially. We knew we might be in a position of questioning Mr. Ford's ability to drop his appeals because he was making, he was saying those things at that point. So we turned to a psychiatrist who knew forensic psychiatry and the law and in our situa-

tion we thought that would be very helpful and he came well recommended by virtue of his consultation with the D.C. Circuit.

Through 1983 Mr. Ford's delusional system continued to change somewhat. The hostage crisis theme was still there but he began to develop other delusions as well and I believe in about April of 1983 or May Mr. Ford indicated that he had joined the Ku Klux Klan and not too [11] long after that he started writing in his letters that he was ending the hostage crisis, that he himself had brought a number of the perpetrators into the Courts, had appointed new justices of the Florida Supreme Court and there was a sentence that within his delusional world he had gained some resolution of what he had called the hostage crisis. Even at that point at the times that Mr. Ford would come out to visit, and he frequently would not come out to see us when we went to see him at the prison, we had no reason to believe that he thought that he couldn't be executed or that he had no understanding of why he was on Death Row; and for us that was the critical factor that we were looking at. We were at a point in his case where consultation with him about the issues in his case was not necessary because the issues were proceeding through the Courts in a fairly regular manner and there were legal decisions to be made but the choice of issues to litigate had been made long before.

THE COURT: Why would you just watch all this as you have described then, and do nothing?

MR. BURR: Your Honor, we did not do nothing. We retained the services of psychiatrists—

THE COURT: Why didn't you file something in the Courts?

MR. BURR: I didn't—I had no reason to file anything because I had no reason to think there was a legal [12] claim related to his state. This was—

THE COURT: Why?

MR. BURR: Pardon me?

THE COURT: Why would they tell us he was fine and dandy?

MR. BURR: No. Both Doctor Amin—

THE COURT: What were they telling you then?

MR. BURR: Doctor Amin and Doctor Kaufman were saying to us they thought Mr. Ford was psychotic but his psychosis at that point focused on nothing to do with this case, had nothing to do with his ability as far as he could tell to understand his case. He seemed in our conversations with him to be aware that he was on Death Row in Florida for the murder of Dimitri Walter Ilyankoff and that he was under sentence of death and at that point in time that much orientation to reality was all that the law required. We had no basis for a claim.

I have to stress that our contact with Mr. Ford, though we attempted to have a good deal of contact, was not as frequent as we would have liked. We went to the prison to see him quite often and he would not come out and the prison's policy is not to bring somebody out that doesn't want to see their lawyer. We questioned a good deal of the prison staff about whether he was being treated. The prison's medical staff took the position that there was [13] nothing wrong with Mr. Ford. So we were caught in a position of not being able to get him any treatment for what our psychiatrists thought was a serious illness because the prison wouldn't treat him. We were in a position—

THE COURT: But you didn't file any suit to compel this?

MR. BURR: I did not file a right to treatment suit, no.

THE COURT: How come?

MR. BURR: At that point—

THE COURT: You think you just wait until you lose all the appeals and you got in a situation like this, then you would bring it up?

MR. BURR: No, Your Honor. I had no reason to believe at this point that his illness would invade his ability to understand his sentence of death and why he got it. I had absolutely no reason to believe that. Certainly looking back on it I can see that that would have been something to look for and in fact, we did look for.

The first indication, the very first indication that we had that Mr. Ford's illness crept into his ability to understand his sentence of death was in October of 1983. In about the middle of October Mr. Ford came out to see a minister from Nashville who had been corresponding with him for a number of years and had seen him occasionally, I was [14] with the minister, and at that point was the very first time that I had any knowledge of Mr. Ford thinking that he was no longer on Death Row. At that point in time for the first time I had heard he began talking about the case of Ford versus State as he calls it. And he explained that Ford versus State had overturned the current death penalty statute in Florida, had required that the death sentence be imposed by panels of twelve judges, and that he was no longer under sentence of death. In fact he was free to leave the prison but that he had decided that he would stay. At that point in time—

THE COURT: October, when, '83?

MR. BURR: October the 14th, '83, I believe was the exact date. October of '83. Within a week thereafter we did something. We invoked the statutory procedure in Florida, Section 922.07 for the Governor to inquire into his competency to be executed. That was the very first time that we had any knowledge of his underlying psychotic processes invading his ability to understand the nature and effect of the death penalty.

At that point in time in the law we were not certain whether the administrative remedy under 922.07 was something that we had to follow in order to adopt our remedies before moving into Federal Court or whether we could move into Federal Court immediately. We

determined, on the basis [15] of what we understood the law to be then—

THE COURT: Go ahead.

MR. BURR: We determined, "we," meaning I and my colleagues at the Public Defender's Office determined that the safest course was to proceed through the administrative remedy first prior to moving into Court so that there would be no question about exhausting all available State remedies. We did that. We invoked the procedure. Governor Graham appointed three psychiatrists to go evaluate Mr. Ford. We spoke and communicated with those psychiatrists in advance. We were present at their evaluation of Mr. Ford. We were provided their reports thereafter. And we filed a written response to their reports. Interestingly enough though, during the entire process, the Governor's office, when I would make inquiries of the Governor's office as to when they would like something from me or whether I would have the opportunity to submit input, the Governor's Office took the consistent position that we could give them whatever we wanted to but they weren't sure whether they would consider it or not. We did have the opportunity in November after we had invoked the procedure, but before the Governor's psychiatrists saw Mr. Ford, we had the opportunity for Mr. Ford to see Doctor Kaufman and Doctor Kaufman prepared a report which we provided to the Governor and to the psychiatrists that he appointed. We, I believe, submitted [16] to the Governor in writing, again not knowing whether it would be even read or not. At the end of February, 1st of March of 1984, and about a month later—I'm sorry, two months later on April the 30th, Governor Graham answered the question posed by 922.07 by signing the death warrant which represents his conclusion of that proceeding.

At that point we knew that we needed to move into Court and we moved into Court as quickly as we were able. The circumstance that intervened between April 30th and the middle of May was our representation of

another client, James Adams, who was ultimately executed and for whose case our entire capital staff was working on that case.

So that's the sequence of events. If there is any questions I submit about the factual representation that I make, that I have made in this argument, seems to me the only proper way to resolve that is for me to be sworn as a witness and questioned and to answer under oath because it is a factual question and I, as the person in this office who has had the ongoing contact with Mr. Ford and the person that is uniquely possessed of the knowledge upon which our office acted or should have acted on behalf of Mr. Ford.

With that as the factual background, the question of abuse of the writ comes into this. Abuse of the writ, as the Court knows, applies to a successive petition which raises an issue that could have been raised in the first [17] petition but was not. If there is such a situation, abuse of the writ would be found. The law is very clear on that and well settled. The law is equally well settled that if there is no factual basis to raise a claim there can be no abuse of the writ if the factual basis arises after the 1st proceedings. And that is precisely where we are here. The factual basis was not available before October of 1983 and at that point in time the case had left the Court, had gone through the U.S. Court of Appeals and had had certiorari denied in the U.S. Supreme Court. There was a limited remand pending between October and March of 1984 limited to a single narrow question which the Court has already now disposed of. We did not think we had an opportunity to supplement that proceeding because it was the mandate that had issued had limited the remand to the single issue under Barclay.

So with that analysis, we submit there is no question of abuse of the writ. Claims could not have been raised, if the facts which we have alleged in support of our claim are true could not have been raised. The claim did not arise until after the first proceeding was entirely complete.

The next question that comes is if abuse of the writ is not a bar, then is there any other procedural bar for this claim? We submit there is none.

[18] The State has argued the question of delay. The only delay issue, however, which can be considered in Federal habeas corpus is the issue of delay described in Rule 95 of the Rules describing habeas proceedings under Section 2254. That Rule incorporates the traditional Latches rule from equity. And the critical factor there is that the State be able to show in order to have benefit of that Rule of delay, that the State be able to show that the delay has prejudiced its ability to defend on the merits of the issue presented. The State has made no suggestion that the short delay between October and May has prejudiced their ability to defend against the merits of this issue at all. So where does that leave us? That leaves us with no abuse, with no delay and with the State in the middle saying somehow this has to stop, these eve of execution applications have to be put under wraps and done away with and you have to find either abuse or delay or some sort of equitable remedy barring the consideration of this issue. We submit there is none. There is abuse of the writ and there is delay. And those are the only two matters under the Federal habeas statute that can preclude the Court's ruling on the merits that is a Federal matter. Obviously there's procedural default, but that's not material to this issue.

• • • • •

[Argument by counsel for respondent Wainwright:]

[38] I'd like to start off with the abuse of the writ argument and I'm going to apply it to all the claims that were raised in this particular petition.

I think to start with let's look at the background of abuse of the writ. I think the Fifth Circuit opinion in Jones versus Estelle is a very well reasoned opinion. It gives the Court background on when abuse of the writ should be applied. Jones versus Estelle talks about abuse

of the writ boils down to whether or not Petitioner can excuse his admission of claim from an earlier writ by proving he did not know of the new claims when the earlier writ was filed and we give examples when there has been a change in the law for development in the facts which was and I stress reasonably knowable before.

It is the State's position, and we are not disputing the facts presented by Petitioner here, that's [39] one reason why there is no reason to have evidentiary hearing on abuse of the writ. We are only disputing the interpretation of facts, and I don't think you need an evidentiary hearing for a dispute on the interpretation of facts.

I think also when you are talking about abuse of the writ, the Courts have recently added perhaps another element to abuse of the writ; that is the timing of the second petition. The Court in Autry versus Estelle as cited in the response and I think in Woodard versus Hutchins, Justice Powell talking for the majority of the United States Supreme Court said, and again it's important to know that Woodard versus Hutchins involved a claim of insanity again at the time of execution but there were new facts which had arisen from the time of trial to the time of execution which Mr. Woodard is now insane. Justice Powell said "This is another capital case in which a last minute application for stay of execution and new petition for habeas corpus relief has been filed with no explanation as to why the claims were not raised earlier or why they were not raised in one petition. It is another example of abuse of the writ." So I think from reading that you can read the interpretation that one of the factors to consider in whether or not there has been abuse of the writ is the timing of the second petition; and that is what the State is relying on.

I want to make it clear we are not arguing delay [40] as Petitioner has set out. Delay only insomuch as the timing of the second petition, not because we cannot respond on the merits.

I'd like to go over the facts just from the Defendant's own pleading in this particular case. This is quoting from Petitioner's petition itself:

"On December 5, 1981, Mr. Ford's health and normalcy began to give way." This is at Page 13 in the petition. "By February 28, 1982, Mr. Ford's"—

THE COURT: December 5th was the first day of hearing.

MS. BRILL: That's correct, Your Honor. That's why I'm quoting. I'm quoting from the Petitioner, from Counsel's own words; so we are not talking about disputive facts. These are his own words that are in his petition.

At Page 13 he says that "His health and normalcy began ti give way. Then by February 28, 1982, Mr. Ford's delusional system had taken a quantum leap." This is at Page 16. "By April 17, 1982, Petitioner showed some further advance in his delusional systems accompanied by the injection of paranoia into his delusions as well as the re-emergence of his loosening of associations. By July 8, 1982, Mr. Ford's remission ended." And he goes on later at Page 31, "By September 11, 1982, Mr. Ford's delusional system had become all-pervasive and all-encompassing. There [41] has been no remissions from the grip of the delusion, the loosening of associations and the hallucinations since then. Then on September 12, 1982, three new aspects to the delusion emerged." That is at Page 37. Then at Page 39 Petitioner alleged, "On October 22, 1982, Mr. Ford began to report yet another new development in his delusion, one that, over the course of the next year and beyond, would become the most significant element in his world of delusions—the taking of hostages by the persons who were already tormenting him at Florida State Prison. Then by May 10th, 1983, Mr. Ford's delusions became increasingly grandiose, a new element entered the delusions. Then, in the last letter available from Mr. Ford on No-

vember 28, 1983, "Petitioner alleges at Page 53 of the Petition, "That Mr. Ford was still grandiose, but his delusional systems seem to have changed significantly in content. His form of communication was becoming quite esoteric and incoherent, as commonly occurs in severely psychotic individuals."

Thus, it is the State's position from Counsel's own words which are in the petition that there were facts which were available to his support in good faith assertion as to the Petitioner's mental capacity to be executed. This is long before October 20, 1983, when he invoked the procedures under 922.07.

I think it is important to remember the issue in [42] the case is not the issue of the Petitioner's competency in fact; but the issue is whether or not he is entitled to, procedurally entitled to judicial determination of competency as opposed to being forced to rely solely on the Governor's determination.

Now Counsel has not given any reason why he could not have brought forth back in, let's take from December, from the day when the Governor appointed the three psychiatrists who all found Mr. Ford competent to be executed, why he couldn't at that point, from December 1983 until he finally files some sort of petition in State Court on May 21, 1984, ten days before his execution, he could not have filed some sort of proceedings in State Court and then into the Federal Court asking that he should have judicial determination of his competency. This is never done until ten days before the execution.

THE COURT: December of '83 was when the examination was.

MS. BRILL: Yes. And I believe within a couple of weeks after that all three psychiatrists had reported that Mr. Ford was competent and understood the reasons that he was to be executed and reasons why he was to be executed. And from that point on Counsel never did anything to bring this issue to the attention of any Court in

the State's system or in the Federal system until May 21, ten days before Mr. [43] Ford's scheduled execution.

Furthermore, I think it's important to note some additional history. After the Defendant initially filed his first habeas petition in this Court on December 2nd, 1981 and this Court denied the petition on December 7th entering your written order on December 10th, the case then progressed to the Eleventh Circuit, through the panel decision and the en banc decision which was rendered by the Eleventh Circuit on January 7, 1983; and in that order of January 7, 1983 there was an order for remand to remand this case back on the Barclay issue. Now at that time according to Petitioner's own statements Mr. Ford was suffering under some very heavy delusions at this point in January of 1983. Yet Counsel never asked the Eleventh Circuit in that remand can we add an additional claim as to his competency to be executed. He moved for a re-hearing in the Eleventh Circuit, I believe, on January 28th, but in that new motion for re-hearing of the en banc decision, he never asked for it, to have that, the remand to this Court, expanded to include other claims that have since arisen. And I think the facts certainly by then were available for Counsel to have done so. And especially I think that that idea of asking the Court or having this Court take jurisdiction over the new claims is supported by the Eleventh Circuit's recent decision in Thompson versus Wainwright which is at 714 F 2d 1495 and [44] Arango versus Wainwright, which I had cited in the response. In both those cases the Eleventh Circuit has held that the District Court has the authority to continue a case to allow petitioners to either amend the petition, file a second petition, consolidate them, and leaving that petition dormant on the district court docket while the Petitioner goes back to exhaust the State remedies. So he could have done that. But he didn't. Instead his claim is dormant, stays quiet until ten days before the execution.

I think the instruction in Goode versus Wainwright in the Eleventh Circuit is applicable here. In Goode the Court said that a showing of changed conditions does not mean that post-conviction insanity can be held back of an issue until the eve of execution and then raised for the first time. And again in Hutchings versus Woodard the Supreme Court stated that a pattern seems to be developing in capital cases of multiple review in which claims could have been presented years ago or brought forth or in piecemeal fashion only after the execution date is set or becomes imminent. Federal Courts should not continue to tolerate even in capital cases this type of abuse of the writ. And it is the State's position this Court should not either.

• • • •

[Rebuttal argument by counsel for petitioner Ford:]

[61] Finally on the issue of abuse. It seems to me that Ms. Brill's presentation leaves us in the following posture on abuse. She says that if you read through the pleadings starting with the letter of December the 5th, you find that we have alleged various facts which could have been a good faith basis to assert a claim of incompetency. The letter of December the 5th that she referred to where normalcy began to give way I had not seen until sometime later. So when I represented to you before that on December [62] the 5th Alvin Ford seemed fine to me I wasn't aware of that letter; but at the time it would not have mattered because Alvin Ford sitting in front of me appeared to be competent.

It's terribly important to differentiate between the process of an evolving psychosis which has been going on with Alvin Ford for the last two-and-a-half years and when the level of psychosis and quality of psychosis makes someone incompetent to be executed. They are very different analyses, very different factual phenomenon. Someone can be terribly psychotic for a long time and still have an understanding as to where he is and why he

is there. And that's the issue. If there is any question about when we, as Mr. Ford's Counsel, first had notice that he did not understand where he was and why he was there, which are critical competency facts then we should have a hearing; otherwise, our representation that we first knew about this in mid-October 1983 stands undisputed. We have simply alleged the fact of his growing psychosis to demonstrate the genuineness of the condition that has led to his incompetency. If there is any question about when it first came to our attention, a hearing on it ought to be held.

* * * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 84-6493-Civ.-NCR

ALVIN BERNARD FORD, ETC., PETITIONER

vs.

LOUIE L. WAINWRIGHT, ETC., RESPONDENT

[ORDER TRANSCRIBED IN RECORD OF HEARING]

* * * *

[63] THE COURT: If matters like this weren't so serious, I'm sure someone like that fellow on 60 Minutes that does these humorous observations could really do one on us in this situation. I haven't ruled yet and I understand there's already been a motion to stay filed in the Court of Appeals and a response by the Attorney General's Office and the Florida Supreme Court is already asking questions about what happened.

Well what happened so far, I guess, is somewhat predictable. It's kind of like watching Casablanca on TV. You know about every three years it comes around again. And almost three years ago I had this case before and I dropped everything and heard it all day Friday and all day Saturday and all day Monday and issued my order, and by the time I issued the order the stay was already entered in the Court of Appeals from December of that year to the following October and issued a mandate that they did agree with my opinion and they established a lot of law for this Circuit in the process.

The first contention of the Defendant seems to be 922.07 is—They don't contest the constitutionality of it; they just contend that even if the Governor follows the statute that is not enough, there's still got to be an independent judicial review when the question of competency [64] is raised. I don't find any support for that theory at all. Certainly not in Goode versus Wainwright which was the

decision handed down April 4th, 1984, by the Eleventh Circuit, and as I recall, that also was the same date Judge Hodges entered his opinion in Tampa in the Lower Court. And that explains the urgency of these things because the execution was scheduled for the next day, and in this situation, the warrant, which has been signed by the Governor, the warrant of execution must be carried out by the 31st of May and this is now the 29th and so there is good reason for all this planning in advance the system tries to anticipate and still give as complete a review.

The matter was filed in this Court on Friday last a couple minutes before 5:00 o'clock and after the Supreme Court of Florida had denied the relief sought by Petitioner earlier in the day. Of course 5:00 o'clock Friday began the holiday weekend and this is now the first working day after the holiday.

Counsel have presented extremely good argument, I think in your memoranda and in view of the flood and torrent of recent decisions on the matter I've got to believe at this point that such excellence either results from an extreme professional interest in these questions or the fact that you anticipate there's going to be one gigantic last-minute deluge of pleadings and so the [65] preparation is made in advance.

This matter was not started in the State trial court until May 21st following the filing of the Governor's writ of execution and the reason given by Counsel for Petitioner for that delay for the period of time in May was because of its being tied up with the Adams matter, and Mr. Adams was executed also sometime in May.

There are two or three—Well two basic claims in this matter. One that the Petitioner Ford has become incompetent and therefore cannot be executed; and secondly, that the instruction as to the majority vote denied his right to have the jury instructed on the question of the majority vote on the issue of the recommendation of life vis-a-vis death penalty.

As to the matter of incompetency. In December of 1981 when I considered this question before, had an extended evidentiary hearing and appeals were taken, there were, as I recall, seven issues. None of those dealt with the question of competency. There are several disturbing facts about it, and that is the claim now that in December of 1981, at the time of the hearing Mr. Ford became incompetent, and in fact as I recall there was some testimony to that effect by Doctor Amin at the time of the hearing. And Doctor Amin, as I recall, was the psychiatrist, forensic psychiatrist. He was the only one in the State of Florida and he felt [66] nobody else but him could be a valid witness in the matter. I am trying to find the refutation Doctor Amin made. In this flurry I have read it but I have not made a note of it. He made a comment then that would have triggered anybody, I think, into seeking some form of judicial determination about the question of—I apologize that in the rush of this thing I just cannot put my finger on it—And I made some notes as to matters present in the argument by Counsel and Ms. Brill made a number of comments during her argument and I think those are worth re-examining.

The petition for writ of habeas corpus filed by Defendant Ford, "On December 5th, 1981," which by the way was the first day of the hearing before me in 1981, "health and normalcy began to give way." There used to be some debate about the word "normalcy," whether or not it was a real word, but one popularized by a fellow resident of my home county, President Warren Harding. There are many people who criticize that word as being an improper word; however, I do think Harding has been borne out in this as he has in some other things. And then "by February 28, 1982, Mr. Ford's delusional system had taken a quantum leap." My notes indicate that something more specific had happened by that time; that Mr. Ford had become obsessed with a reference to the Ku Klux Klan. And then in April he "showed some further

advance in his delusional systems, accompanied [67] by the injection of paranoia into his delusions as well as the re-emergence of his loosening of associations." I take it those are psychiatric phrases because I don't know any lawyers that talk that way. "By July 8, 1982, Mr. Ford's remission ended." However, by August of '82, the Defendant Ford thought Doctor Amin was his persecutor and refused to see him. It is at that point the Defendant, Counsel at least, wanted Ford to see Doctor Harold Kaufman in Washington D.C. in January of '83. And there was some dispute with the prison authorities, whether Strickland or Wainwright or the hierarchy there because they refused to treat Mr. Ford.

I think it significant to note that although they refused to treat him in January, February of 1983, nothing, absolutely nothing was filed to compel treatment. I don't understand that at all. Such a major inconsistency in all this.

Mind you, before we get to January 1983, Page 31 of the petition, "Mr. Ford's delusional system had become all-pervasive and all-encompassing." Same page: "There has been no remission from the grip of the delusion, the loosening of associations, and the hallucinations, since then," September of '82. And so, September 12th, a day later, "Three new aspects to the delusion emerged. On October 22, 1982 Mr. Ford began to report yet another new development in his [68] delusion, one that, over the course of the next year and beyond, would become the most significant element in his world of delusion—the taking of hostages by the persons who were already tormenting him at Florida State Prison."

Move on past January and failure to file suit. By May 10th, 1983, "Mr. Ford's delusions become increasingly grandiose, a new element entered the delusions," Page 48 of the petition. The last letter available, November 28, 1983, "Mr. Ford was still grandiose, but his delusional system seemed to have changed significantly in context. His form of communication was becoming quite esoteric

and incoherent, as commonly occurs in severely psychotic individuals."

I ruled on this matter previously on December 8th of 1981, a stay was entered that night and when it moved into the Court of Appeals and it remained there as I said for about 22 months. There was a panel opinion decision and then it went en banc and the Court of Appeals en banc handed down a major decision on these issues affecting death sentences particularly in the State of Florida as well as throughout the Circuit in Ford versus Strickland. That key situation came down January 7th, 1983.

Barclay decision was already in the Supreme Court and there was some congruity between that decision, at least in the sphere of applicability between that Barclay decision and Ford, and in the end of the opinion, the Court affirmed [69] this Court but remanded it for any further effect that the Barclay decision might have on it. Barclay came down last July, July of '83, about July 6th.

The next date that really strikes me as being significant in all this is October the 11th, 1983. That's significant folks, because that's the date the mandate was entered by the Court of Appeals remanding it to this Court. It was a Tuesday. That's significant because on the 14th of October, three days later, just about time for the mandate to come down, be received, there was a meeting between Counsel for Mr. Ford and Mr. Ford and about a week later was the assertion of Counsel they invoked Section 922.07. Now what I deduce from all that is this is absolutely a classic pattern of a Defendant allegedly having a mental problem and perceiving a rook card in their possession, a high trump shall we say and holding it in the vest pocket until the last minute and then the minute the mandate came down they played the card and invoked 922.07.

The pattern did not end there. It continued. 922.07 was followed. The Governor appointed three psychiatrists They examined him in the presence of the Defense Counsel, received submissions from the Defense Counsel and

returned their report a couple weeks after that examination. The examination was in December of 1983. Still nothing other than the request for 922.07.

[70] And as the Court of Appeals pointed out in Goode, Defendant was free to assert this contention that he could not be executed because of post-conviction insanity in State and Federal Courts from the time that the State Court sentenced him to death; thereby he could secure an orderly determination of his then current mental condition. Certainly, he could have raised the issue when the Governor signed his first execution warrant in 1982. Goode has made no such contention in his State merits appeal, in his State collateral attack on his conviction or in his first Federal habeas case.

Certainly sounds like they are talking about the Defendant Ford.

The contention of the Defendant, however, is Goode doesn't cover this case like a blanket because Goode had raised the question of competency to stand trial in his first Federal habeas. But it raised that question and the Defendant perceives that this thereby is a judicial invitation to a clear, fast track for habeas corpus relief as to the death warrant in this case.

I don't find anything in the cases or certainly in Goode that would indicate any such solace for the Defendant.

Instead we find again as I indicated earlier that it was filed on May 21st, ten days prior to the expiration of the writ of execution, filed a motion for [71] hearing and appointment of experts for determination of competency and motion for stay of execution in the State trial court, knowing that the route of litigation at that point has to be the State trial court, the State Supreme Court and then inevitably here and then inevitably the Court of Appeals and then inevitably the U.S. Supreme Court in ten days.

This is not the first time this type situation has come up obviously because Justice Powell referred to another one in Woodard as an example of abuse of the writ in

a capital case when there is a last minute application for a stay of execution and new petition for a writ of habeas corpus is filed with no explanation as to why the claims were not raised earlier. There has been an explanation advanced but I don't find any credibility to it or why they were not all raised in one petition. There is no doubt in my mind that this was all held back until the very last minute and these five Courts have been plunged into this frantic last-minute drop-everything and turn their attention to this one petition. It's just got to be a gross abuse on the system as well as an abuse of the writ.

I find that there is an abuse of the writ throughout this matter. But reaching the merits of the matter as well I find no reason to grant the relief sought by the Petitioner. The Governor of this State acting under 922.07 [72] the Court finds that he has acted properly, has followed the steps. Each of the three psychiatrists whom he appointed has found the Defendant sufficiently competent to be executed under the law and so on the merits, as well as on this issue, the petition must fail.

As to the matter on the instruction, the merits of that also the Defendant can only present conjecture of prejudice and ignores the findings of the trial court that all eight aggravating circumstances were there. Even though the Supreme Court of Florida subsequently decided that one of those aggravating circumstances was a duplicate of another one set forth in the statute, the two others were not supported, they still probably supported the death sentence imposed by the State trial judge. I cannot read this comment of one juror to indicate that there was some prejudice to the Petitioner at that time in connection with the sentence or recommendation as to the sentence.

Petition is denied because I think it is an abuse of the writ.

I will also deny the granting of a certificate of probable cause.

Inasmuch as Mr. Ford is a pauper, I have no choice but to saddle the taxpayers with the preparation of an instant transcript and it is so ordered.

I will deny your application for a stay.

[73] MS. SHEARER: Your Honor, I have prepared some proposed—

THE COURT: I will not file any written order. There isn't time.

MS. SHEARER: I just had an order directing the transcript be prepared and an order that the oral findings be the order of the Court.

THE COURT: These oral findings are considered as the Court's findings and conclusions, my findings from the bench. I don't see how anybody has time to do anything else. I marvel at my fellow judges that are able to get out an opinion under these conditions.

MS. SHEARER: Well would you consider signing these orders or would you rather—

THE COURT: May I see it? I don't agree to anything in advance. My lawyer told me never to sign anything without reading it.

I think it's exactly what I just did but I will sign it.

Thank you very much.

I appreciate all the hard work everybody has done.

Thank you.

MR. BURR: Your Honor, I have orders denying probable cause if you would like a separate written order.

THE COURT: If you'd like it, I will sign it.

[74] MR. BURR: Thank you.

And we would apply for a stay pending appeal, and I think I know what the order would be on that as well. There is an order denying that.

THE COURT: I figure my work is done. If the Court of Appeals wants to stay it, they may. They don't agree with me on that procedure. Just seems to me that's clearly where it fails. And I will call the Court of Appeals right now to tell them of the rulings I have made.

* * * *

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH FIRCUIT

Nos. 84-5293, 84-5372

ALVIN BERNARD FORD, PETITIONER-APPELLANT

v.

CHARLES G. STRICKLAND, JR., Warden, Florida State Penitentiary, Louie L. Wainwright, Secty., Dept. of Offender Rehabilitation, Florida, and Jim Smith, Atty. Gen., Florida, RESPONDENTS-APPELLEES

ALVIN BERNARD FORD, or CONNIE FORD, individually, and acting as next friend on behalf of ALVIN BERNARD FORD, PETITIONERS-APPELLANTS

v.

LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida, RESPONDENT-APPELLEE

May 30, 1984

Before HENDERSON, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

In Case No. 84-5293 we deny the application for a certificate of probable cause and we deny the application for stay of execution. The single issue raised, i.e., the *Barclay* issue, requires no discussion.

In Case No. 84-5372, we grant the application for a certificate of probable cause, and we grant the application for a stay of execution, finding that two of the grounds asserted warrant this relief.

First, Ford asserts that he is entitled to a procedural due process hearing to determine whether he is currently insane. If so, this should delay his execution because such could be cruel and unusual punishment and thus proscribed by the Eighth Amendment. Ford has raised a substantial question and we stay his execution so that a panel of this court may answer it. Credible evidence presented by the petitioner indicates that Ford is insane. Two psychiatrists appointed by Florida's Governor found him psychotic.

The Supreme Court has not yet decided whether infliction of the death penalty upon an insane condemnee is cruel and unusual punishment within the meaning of the Eighth Amendment. *See Caritativo v. People of the State of California*, 357 U.S. 549, 78 S.Ct. 1263, 2 L.Ed. 2d 1531 (1958); *Solesbee v. Balkcom*, 339 U.S. 9, 70 S.Ct. 457, 94 L.Ed. 604 (1950); *Nobles v. Georgia*, 168 U.S. 398, 18 S.Ct. 87, 42 L.Ed. 515 (1897). The Florida Supreme Court in holding that Ford was not entitled to a due process hearing relied upon *Solesbee*. At the time of *Solesbee* the United States Supreme Court had not applied the Eighth Amendment to the states through the due process clause of the Fourteenth Amendment. In *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), the Supreme Court incorporated the Eighth Amendment right to be free of cruel and unusual punishment to the states. For still another reason, *Solesbee* seems of dubious support. Since that time, as a result of *Furman*, the Supreme Court has drastically altered the constitutional framework in which a citizen in this country can be executed.

We believe the district court erred in holding that Ford violated Rule 9(b) of the Rules governing § 2254 cases. The district court dismissed the petition on the ground that the petitioner should have asserted the insanity ground in his prior petition and that he thus abused the writ.

The district court made this ruling without taking any evidence. We then have been caused to review the factual context of Ford's first petition for the writ, which was considered in December of 1981 by the district court. Neither the evidence at that hearing, which we have reviewed, nor the district court order reflects that the district court was presented with an issue of Ford's insanity at that time. The record does reflect that in late 1981 and in 1982, counsel for Ford became apprehensive about his mental state and sought psychiatric examinations for Ford. From December of 1981 until October of 1983, Ford's case was on appeal to this court and to the United States Supreme Court from the district court's denial on December 10, 1981, of Ford's petition for writ of habeas corpus.

Since we find no evidence in the record to suggest that the incompetency issue was available in December of 1981 when Ford's first petition was filed, we conclude for the purpose of staying Ford's execution that there was no abuse of the writ.

The state argues that Ford should have filed a petition for some type of relief with respect to the insanity issue before filing the petition now under consideration.[1] However, the state does not explain to us just what Ford should have filed and when. On October 20, 1983, Ford, through his attorneys, sought exhaustion of state remedies pursuant to Florida Statute § 922.07. This was after the mandate issued from the court on October 6, 1983. The Governor did not render a decision with

---

[1] We have found no precedent, and none was cited by the State, holding that it is a per se abuse of the writ to fail to file a second habeas petition while the first petition is still pending. Assuming that the law might and should evolve to impose such a duty, we would not be inclined to do so without the benefit of an evidentiary hearing to give Ford and his counsel an opportunity to explain their actions. Such actions would fall more clearly under Rule 9(a) of the Rules governing § 2254 cases, allowing dismissal of delayed petitions if the State's ability to respond is impaired. However, the State makes no such argument here.

respect to the § 922.07 proceeding until he signed the death warrant.

If Ford had filed a petition for an evidentiary hearing with respect to insanity in the state courts, he would most probably have been met with a ruling that Ford's sole relief was pursuant to Florida Statute § 922.07. In this very case, the Florida Supreme Court held that "the statutory procedure is now the exclusive procedure for determining competency to be executed." *Ford v. Wainwright*, 451 So.2d 471 at 475 Supreme Court of Florida, May 25, 1984. We believe if Ford had filed in the United States District Court for such relief, his petition would have met the same fate.

We conclude that this court's opinion in *Goode v. Wainwright*, 731 F.2d 1482 (1984), does not control this case. There, Goode's claim of incompetency came after he had been twice adjudicated competent in state court proceedings which were affirmed by our court. Thus, there were clear grounds for abuse of the writ in the *Goode* case because at the time of the filing of the successive petition, Goode had asserted the insanity ground in a prior proceeding.

Because we find that Ford's petition for relief filed in the district court did not constitute an abuse of the writ and because we believe his claim of privilege not to be executed while insane raises substantial procedural and substantive Eighth and Fourteenth Amendment grounds, we stay the execution on this first issue.

Ford's second ground for relief is his argument that Florida administers the death penalty arbitrarily and discriminatorily on the basis of the race of the victim, the race of the defendant, and other impermissible factors, in violation of the Eighth and Fourteenth Amendments. The district court rejected this claim as an abuse of the writ.

This issue, in the context of the Georgia death penalty statute, is now pending en banc consideration in this circuit. *Spencer v. Zant*, 715 F.2d 1562, *vacated for rehearing en banc*, 715 F.2d 1583 (11th Cir. 1983);

McCleskey v. Zant (11th Cir. 1984) (oral argument scheduled for June 12, 1984).

As we noted in *Adams v. Wainwright*, 734 F.2d 511, 512 (11th Cir. 1984). "The state of the law with respect to these issues is unsettled." In chronological order, see *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978) (rejecting argument that the Florida statute was being applied arbitrarily, and discriminatorily in violation of the Eighth and Fourteenth Amendments because statistical evidence proffered was insufficient), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979), *Smith v. Balkcom*, 671 F.2d 858 (5th Cir. 1982) (denying Eighth and Fourteenth Amendment claims because statistics unreliable, but stating "in some instances circumstantial or statistical evidence of racially disproportionate impact may be so strong that the results permit no other inference but . . . racially discriminatory intent or purpose"); *Adams v. Wainwright*, 709 F.2d 1443 (11th Cir. 1983) (same), *cert. denied*, —— U.S. ——, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984); *Spencer v. Zant*, 715 F.2d 1562, 1578-83 (remanding Eighth and Fourteenth Amendment challenges for evidentiary hearing); *Spencer v. Zant*, 715 F.2d 1583 (1983) (vacating panel opinion, 715 F.2d 1562, for rehearing en banc); *Sullivan v. Wainwright*, 721 F.2d 316, 317 (11th Cir. 1983) (following *Spinkellink* and *Adams*), *petitions for stay of execution denied*, —— U.S. ——, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983); *Stephens v. Kemp*, 722 F.2d 627 (11th Cir. 1983) (denying petition for rehearing en banc with six judges dissenting), *Stephens v. Kemp*, —— U.S. ——, 104 S.Ct. 562, 78 L.Ed.2d 370 (1923) (granting stay of execution pending Eleventh Circuit's en banc consideration of *Spencer*); *Smith v. Kemp*, —— U.S. ——, 104 S.Ct. 565, 78 L.Ed.2d 732 (1983) (denying petition for rehearing from denial of certiorari; *Adams v. Wainwright*, 734 F.2d 511 (11th Cir. 1984) (granting stay pending en banc consideration of *Spencer*), *vacated without opinion*, —— U.S. ——, 104 S.Ct. 2183, 80 L.Ed.2d 809 (1984).

Our effort to faithfully apply the principles enunciated by the Supreme Court is unusually difficult in these cases. Because of time constraints under which these issues invariably arise, both this court and the Supreme Court have found it impossible in some cases to write an opinion providing a rationale for the decision.

We can discern two possible interpretations of the Supreme Court's recent treatment of this issue; either (1) the Supreme Court sees some significant difference between the contours of the issue as it has been presented in the Florida context, as opposed to the Georgia context, or (2) the procedural posture of cases has been decisive, in that the Supreme Court has declined to entertain this issue when the issue was repeated on the merits in a prior petition.

The State argues with considerable force that the Supreme Court declined to stay the Florida executions in *Sullivan* and *Adams*, while granting a stay of the Georgia execution in *Stephens*, because of some significant (but unstated) difference between Florida and Georgia. Several factors undermine our confidence in the State's position. First, the position does not satisfactorily account for *Smith v. Kemp*, ——U. S. ——, 104 S.Ct. 565, 78 L.Ed.2d 732 (1983), in which the Supreme Court, when presented with this issue, declined to grant a stay of a Georgia execution to reconsider its denial of certiorari. Instead, the Supreme Court's action in *Smith* is readily explained by the procedural posture, *see infra*. Second, no Justice of the Supreme Court and no judge of this court has expressed the view that there is a difference between the issue as presented in Florida, as compared to the issue as presented in Georgia. Third, although pressed at oral argument, counsel for the State could not point to any facet of the evidentiary proffer which might distinguish Florida from Georgia. Finally, our own study of the two proffers (e.g., the Baldus study in Georgia and the Gross and Mauro study in Florida) leaves us

unpersuaded that there is a significant difference between them.[2]

The other possible interpretation of the Supreme Court cases is that the procedural posture has been the distinguishing factor. In both *Smith* (Georgia) and *Adams* (Florida), in which stays of execution were denied, the issue was presented as a successive petition after the same claim on the initial position had been rejected on the merits. Although *Stephens*, in which the Court granted a stay of execution, involved a second or successive writ, it did not involve an attempt to relitigate an issue which had already been rejected on the merits in a prior writ of habeas corpus. There is a well-established distinction in the case law, see *Sanders v. United States*, 373 U.S. 1, 15-19, 83 S.Ct. 1068, 1077-1079, 10 L.Ed.2d 148 (1963), between the *Stephens* posture, in which the rather more difficult abuse of the writ must be shown, and the *Smith-Adams* posture, in which the writ will be denied unless the "ends of justice" require otherwise.

As might be expected, Ford urges that we adopt the procedural distinction between his case and *Adams* because *Ford*, like *Stephens*, involves a successive writ, which can be barred only by a showing of abuse of the writ. This interpretation, however, must account for *Sullivan*, in which the Supreme Court declined to disturb

---

[2] Substantive differences between the Baldus study on Georgia and the Gross and Mauro Florida results are not readily apparent. Both studies examined a number of factors potentially influencing the imposition of the penalty under the respective statutes and corrected the deficiencies in methodology and results that characterized studies previously found inadequate to state a claim. Both studies respectively concluded that, all legitimate sentencing variables held constant, in Florida and Georgia: (1) a white victim murder is significantly more likely to result in a death sentence than is a black victim murder, and (2) a black perpetrator is more likely to receive a death sentence. The Gross and Mauro study expressly compared its results to the Baldus results, and found them comparable. Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, man. pp. 105-110 (October 1983).

this court's denial of a stay, declining to grant a stay of execution pending the filing of certiorari. Our brother, J. Henderson, places his reliance on *Sullivan*, and we readily acknowledge, in this uncertain state of the law, a reasonable basis for his position because *Sullivan* involved a successive writ in the same abuse of the writ posture as this case and *Stephens*. However, two factors persuade us that *Sullivan* is not controlling.

The first is that the decision in *Sullivan* to deny a stay was not a decision on the merits of Sullivan's constitutional challenge. As we recently noted in *Ritter v. Smith*, 726 F.2d 1505 at 1511 & nn. 16-17 (11th Cir. 1984), denial of a stay pending filing and disposition of a writ of certiorari "imports no more than a decision to deny certiorari, which does not express any views on the merits of the claims presented." *Id.* at n. 16 (citing *Graves v. Barnes*, 405 U.S. 1201, 1204, 92 S.Ct. 752, 754, 30 L.Ed.2d 769 (1972) (Powell J. in chambers)).

The second and more important factor is that *Sullivan* was decided before the Eleventh Circuit voted in *Spencer* to consider the issue en banc and before the Supreme Court granted the stay of execution in *Stephens*. *Sullivan* was decided on November 29, 1983. The *Spencer* issue was voted en banc on December 11, 1983. Also on December 11, 1983, six judges of this court dissented from an order denying en banc rehearing of the panel order denying a stay in *Stephens v. Kemp*, 722 F.2d 627 (11th Cir. 1983) (Godbold, Chief Judge, Johnson, Hatchett, Anderson and Clark, Circuit Judges, dissenting) (Kravitch, Circuit Judge, dissenting on similar grounds), stating that *Stephens* presented the same issue that the en banc court would consider in *Spencer* and that the issue "beyond peradventure . . . presents a substantial question in this circuit." *Id.* at 628. Thereafter, on December 13, 1983, the Supreme Court in *Stephens* granted a stay of execution "pending decision of the United States Court of Appeals for the Eleventh Circuit in *Spencer v. Zant*." —— U.S. ——, 104 S.Ct. 562, 78 L.Ed.2d 370 (1983). Thus the Supreme Court in *Sulli-*

van was not presented with an argument that the issue was a substantial issue in this circuit because of its pendency en banc,[8] an argument which was later apparently accepted in *Stephens*. We thus conclude that *Sullivan* is not controlling.

Thus, our best judgment is that the Supreme Court cases do not distinguish Florida from Georgia, but rather teach that we should not be entertaining an attempt to relitigate this issue in a successive petition when the issue has already been rejected on the merits in a prior petition. By contrast, the issue can be entertained in a second habeas petition where there is no abuse of the writ. *Stephens*.

We conclude that Ford's assertion of his Eighth and Fourteenth Amendment claims was not an abuse of the writ. Just as in *Stephens*, where the Supreme Court granted a stay, the evidence and legal precedent upon which Ford relies were not available at the time of his first habeas petition. Unlike *Adams* and *Smith*, *Ford* is not seeking to relitigate an issue previously presented and dismissed on the merits.

We have also determined after close scrutiny that Ford presents a claim that in substance is identical to the issues currently under consideration in *Spencer* and *McCleskey*, and is the same claim that led to a stay in *Stephens*. Accordingly, finding in regard to this issue that Ford has presented "substantial grounds upon which relief may be granted," *Barefoot v. Estelle*, —— U.S. ——, ——, 103 S.Ct. 3383, 3395, 77 L.Ed.2d 1090, 1105 (1983), we alternatively grant his application for a stay of execution pending en banc consideration of *Spencer*.

For the two foregoing reasons, in case number 84-5372, we GRANT the certificate of probable cause and STAY the execution.

---

[8] In fact, footnote 3 of the *Sullivan* opinion reflects the Supreme Court's then understanding that the issue before the *Spencer* panel was merely that the district court had not had an opportunity to consider the proffer.

HENDERSON, Circuit Judge, dissenting:

At the outset, I note my agreement with the majority's view that neither the *Barclay* harmless error issue nor the jury instruction claim merit habeas corpus relief. I disagree, however, with the views expressed by the majority that either Ford's mental incompetency argument or the allegation of arbitrary imposition of the death penalty in Florida deserves serious consideration by this court.

Turning to the latter issue first, Ford claims that the death penalty is being imposed arbitrarily in Florida. He grounds this claim in a study written by professors Gross and Mauro. On several previous occasions, this court has addressed the validity of this study in a habeas corpus setting and found it to be inadequate. I see no reason to stray from our path of clear precedent.

In *Sullivan v. Wainwright*, 721 F.2d 316 (11th Cir. 1983), the petitioner challenged Florida's application of the death penalty based on this very same study. In denying relief, the *Sullivan* court found that the study was "[in]sufficient to show the Florida system to have intentionally discriminated . . . ." *Id.* at 317. The majority asserts that because *Sullivan* dealt with the disposition of a stay, it is not a decision on the merits. However, the clear wording of *Sullivan* indicates its clear intent to reach the merits. The majority also distinguishes *Sullivan* because it was decided before the Eleventh Circuit Court of Appeals voted to consider this issue en banc in *Spencer v. Zant*, 715 F.2d 1562, 1583 (11th Cir. 1983). This seems to be an indication that the full court's decision to consider the merits of the Baldus study as it applies to administration of the death penalty in Georgia has some bearing on the Gross-Mauro report in Florida. I do not agree with this evaluation and my conclusion has been reinforced by the recent disposition of *Adams v. Wainwright*, 734 F.2d 511 (11th Cir. 1984) (appeal from denials of second habeas corpus petition and motion for stay of execution).

The petitioner in *Adams*, a black convicted of the murder of a white, precisely as in this case, interposed a challenge to the arbitrary imposition of the death penalty in Florida. On appeal from the denial of a writ of habeas corpus, a majority of a panel of this court voted to grant a stay pending further consideration of this issue in the Georgia case. I dissented on the ground that the *Sullivan* panel previously addressed the validity of the Gross-Mauro study as it pertains to Florida and found it to be insufficient, a decision affirmed by the United States Supreme Court. *See Sullivan v. Wainwright*, —— U.S. ——, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983). On appeal by the state, the Supreme Court dissolved the stay. Because of the factual similarity of this case to *Adams*, I feel a reiteration of the position I took in dissent in *Adams* is justified here.

The majority disagrees. It reasons that the Supreme Court's vacation of the stay in *Adams* was due to the fact that *Adams* previously had advanced this ground of relief in a prior petition. I cannot accept this reasoning. The differing procedural postures of *Adams*, who previously raised this point, and *Ford*, who does so now for the first time, have no bearing on the fact that both petitioners ultimately relied on the Gross-Mauro study which has been adjudicated lacking in substance. A different study affecting another state that has not yet been evaluated by any panel of this court is not relevant to whether Florida is properly administering its death penalty laws. Accordingly, on the bases of both *Sullivan* and the factually-similar *Adams*, I conclude that this claim does not justify our grant of the writ.

I note also the likelihood that this claim should be procedurally barred at this time since it was not asserted previously in Ford's first petition for habeas corpus. Albeit unsuccessful when made then, as now, the ground for relief advanced in *Adams* was well-known and capable of prosecution at the time of Ford's first

habeas corpus application. *See, e.g., Adams v. Wainwright*, 709 F.2d 1443 (11th Cir. 1983) (unsuccessful assertion of claim of arbitrary application of death penalty prior to Gross-Mauro study). The information which forms the basis of such a claim has always been available. Petitioners cannot simply wait to state a claim until new study upon new study emerges when those reports are predicated upon currently available information. To withhold such a ground from an initial petition when the argument was known and available at the time is an abuse of the writ.

I also believe a similar procedural default bars our consideration of Ford's claim that he is presently insane and, consequently, is constitutionally immune from execution.[1] In light of the evidence presented in Ford's first federal petition for habeas corpus in December of 1981, it is evident that, even at that time, counsel for Ford had serious doubt about his mental capacity. Additionally, the record demonstrates that in June of 1983 counsel was well-aware of this potential ground of relief. *See* Report of Dr. Jamal Amin, App. 1, Petition for Habeas Corpus. Regardless of the exact time that his claim of incompetency ripened, however, Ford's counsel readily admits to their knowledge of this alleged deficiency in October of 1983. In light of this admission and the clear holding of the court in *Goode v. Wainwright*, 731 F.2d 1482 (11th Cir. 1984), I conclude that the failure of counsel to bring this matter to the attention of a court until now to be an abuse of the writ.

In *Goode*, after this court denied the writ on appeal from the petitioner's first habeas corpus petition, the governor began his § 922.07 inquiry. On March 6, 1984, Goode filed a habeas corpus petition in the state court

---

[1] It should be emphasized that the state is in no way attempting to execute an insane person. On the contrary, Florida employs a statutory procedure to avoid that result, *see* Fla.Stats. § 922.07, which has been upheld under a due process challenge. *See Goode v. Wainwright*, 731 F.2d 1482 (11th Cir. 1984).

which raised, *inter alia*, his incompetency to be executed. That petition was denied on April 2, 1984, and on the following day, he filed a petition in the district court which denied the writ on April 4, 1984 without a hearing. He then appealed to this court.

The state maintained that Goode's last minute attempt to avoid the consequences of the death penalty was an abuse of the writ under Rule 9(b). Goode contended in response that he was unable to assert his "newly ripened claim" until completion of the § 922.07 procedures. The court did not accept this argument, stating that his

> theory assumes that the issue of insanity *vel non* barring execution is dependent upon the governor's implementation of the statutory procedures of § 922.07. This is not so. If Goode contended, on substantive due process and eighth amendment grounds, that he could not be executed because of post-conviction insanity, he was free to assert this contention in state and federal courts from the time that the state court sentenced him to death; thereby he could secure an orderly determination of his then current mental condition.

Id. at 1483 (footnote omitted). Therefore, even accepting Ford's best argument that a claim of incompetency did not ripen until October of 1983, *Goode* makes clear that federal habeas corpus relief was available at that time.

Ford seeks to distinguish *Goode* on the ground that Goode continually asserted his incompetency throughout the course of the proceedings while Ford claims it now for the first time. I fail to see the value of this distribution since Goode was allowed to pursue his successive claim only because it was "newly ripened," that is, the court did not view his claim of incompetency as a reallegation of the previous insanity plea but as a new and distinct assertion of post-conviction incompetence.

Thus, in the eyes of the *Goode* court, this ground was treated as a new claim for relief. This view is further evidenced by the court's admonishment that "post-conviction insanity [cannot] be held back as an issue until the eve of execution and then raised for the first time." *Id.*

In my view, the conclusion is inescapable that *Goode* binds squarely on our decision here today. Accordingly, because the issue of incompetency matured months ago at the very minimum, the failure to bring it to the federal courts until the eleventh hour is the sort of abuse condemned in *Goode*. I would affirm the judgment of the district court on all issues thereby denying both the stay of execution and the application for a certificate of probable cause.

SUPREME COURT OF THE UNITED STATES

No. A-980

LOUIE L. WAINWRIGHT, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS

v.

ALVIN B. FORD

On application to vacate stay.

May 31, 1984. The application of the State to vacate the order of the United States Court of Appeals for the Eleventh Circuit, dated May 30, 1984, staying the execution of sentence of death presented to Justice POWELL and by him referred to the Court, is denied.

Justice POWELL, with whom Justice WHITE and Justice BLACKMUN join, and with whom Justice STEVENS joins in Part I, concurring.

On May 30, 1984, the Court of Appeals for the Eleventh Circuit, reversing the judgment of the District Court, granted respondent Ford a stay of execution of the sentence of death set for no later than noon on Friday June 1, 1984. The Court of Appeals granted the stay on two separate grounds. First, it stated that Ford's claim that he is entitled under the Eighth and Fourteenth Amendments to a procedural due process hearing to determine whether he is currently insane [the "competency claim"] raises substantial issues that warrant review. Second, the Court of Appeals held that Ford's claim that Florida administers the death penalty in a discriminatory manner on the basis of race and other impermissible factors [the "discrimination claim"] should be held pending en banc consideration by the Eleventh Circuit of *Spencer v. Zant*,

715 F.2d 1562, *vacated for rehearing en banc*, 715 F.2d 1583 (CA11 1983).

I

The Court of Appeals found that Ford's claim of entitlement to a due process hearing on competency to be executed did not constitute an abuse of the writ of habeas corpus, and held that the District Court had erred in holding to the contrary. On the merits, the Court of Appeals stated that this claim "raises substantial procedural and substantive Eighth and Fourteenth Amendment grounds" that warrant review of Ford's federal habeas petition. The Court of Appeals reviewed the relevant record. In view of its findings, I cannot say in this case that the court abused its discretion in staying Ford's execution on this issue.* I concur, therefore, in the order of the Court denying the State's application to vacate the stay.

II

The Court of Appeals also held that a stay of execution should be granted so that Ford's discrimination claim could be held pending *en banc* hearing and decision by that court in *Spencer v. Zant*, *supra*. The District Court had found that Ford had abused the writ by failing to raise this claim in his first federal habeas petition. The Court of Appeals provides no convincing explanation for ignoring that factual determination. Moreover, the Florida Supreme Court held that Ford's discrimination claim was procedurally barred for failure to present it in a motion for post-conviction relief as required by Fla.R. Crim.Pro. 3.850. *Ford v. Wainwright*, —— So.2d —— at ——-—— slip op. at 4-5 (Nos. 65,335, 65,343 May 25, 1984). Neither the Court of Appeals nor the District Court found cause and prejudice to excuse this procedural

* This Court has never determined whether the Constitution prohibits execution of a criminal defendant who currently is insane, and I imply no view as to the merits of this issue.

bar. See *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). Finally, we have held in two prior cases that the statistical evidence relied upon by Ford to support his claim of discrimination was not sufficient to raise a substantial ground upon which relief might be granted. See *Sullivan v. Wainwright*, —— U.S. ——, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983); *Wainwright v. Adams*, —— U.S. ——, 104 S.Ct. 2183, 80 L.Ed.2d 809 (1984). I am of the opinion that the Court of Appeals abused its discretion in also granting a stay of execution on Ford's discrimination claim pending its decision in *Spencer v. Zant*, *supra*.

Justice STEVENS, having joined in Part I above, is of the view that it is unnecessary to consider the discrimination claim presented in Part II.

Justice BRENNAN and Justice MARSHALL join in the order of the Court.

THE CHIEF JUSTICE, Justice REHNQUIST and Justice O'CONNOR would grant the State's application to vacate the stay of execution of sentence of death.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5372

ALVIN BERNARD FORD, or CONNIE FORD, individually
and acting as next friend on behalf of
ALVIN BERNARD FORD, PETITIONERS-APPELLANTS

v.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
State of Florida, RESPONDENT-APPELLEE

January 17, 1985

Before VANCE and CLARK, Circuit Judges, and STAFFORD,* District Judge.

PER CURIAM:

Over ten years ago, on July 21, 1974, Alvin Bernard Ford murdered a helpless, wounded police officer by shooting him in the back of the head at close range. Ford was captured, tried in state court and sentenced to death. The history of these events and the various steps in the judicial proceedings that followed are set forth in more detail in our original panel opinion, *Ford v. Strickland*, 676 F.2d 434 (11th Cir.1982), and in our 1983 en banc opinion, *Ford v. Strickland*, 696 F.2d 804 (11th Cir.) (en banc), *cert denied*, —— U.S. ——, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983).

---

* Honorable William H. Stafford, Jr., U.S. District Judge for the Northern District of Florida, sitting by designation.

The 1983 en banc opinion affirmed the district court's denial of Ford's habeas petition but remanded for a determination of the possible effect on this case of *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), which was then pending in the Supreme Court. That determination resulted in the district court's dismissal of Ford's petition on March 22, 1984. Ford's merits appeal and all collateral attacks to that point had been concluded with results unfavorable to him.

Before resolution of his first federal habeas procedure Ford invoked the procedures of *Fla.Stat.* § 922.07 (1983). The Florida governor appointed a commission of three psychiatrists to evaluate Ford's current sanity in light of the appropriate statutory standards. The commission members reported their findings and on April 20, 1984, the governor signed a death warrant setting Ford's execution for the week beginning at noon Friday, May 25, 1984.

Ford's mother, as next friend, then filed a motion in state trial court requesting a stay of execution, a hearing and court appointment of experts to determine Ford's competency to be executed. The motion was denied summarily. After hearing oral argument, the Florida supreme court also denied relief. *Ford v. Wainwright*, 451 So.2d 471 (Fla.1984). The present petition was filed in district court on May 25, 1984. The district court held a hearing on May 29, 1984, heard argument of counsel and concluded the hearing by denying Ford's petition on the alternative grounds of abuse of the writ [1] and the merits. On May 30, 1984, a divided panel of this court granted Ford's application for certificate of probable cause and stayed Ford's execution. *Ford v. Wainwright*, 734 F.2d 538 (11th Cir.) aff'd, —— U.S. ——, 104 S.Ct. 3498, 82 L.Ed.2d 911 (1984).

---

[1] The summary holding of abuse of the writ on the insanity issue is troublesome under the facts presented. In light of our resolution of the merits of this issue, however, it is not necessary that we reach the question.

Ford contends that presently he is insane.[2] He does not contend that he was insane at the time of the murder, that he was incompetent to stand trial or that he lacked competence to pursue his initial collateral attack. He argues, however, that his mental condition has deteriorated, so that presently he is insane.

Either by statute or case law, states that authorize the death penalty uniformly prohibit the execution of presently insane persons. The origin of the rule is in the common law. Its initial justification is obscure.[3] Florida's prohibition is incorporated in *Fla.Stat.* § 922.07 (1983), which prescribes both the test of insanity and the pro-

---

[2] As a second claim for relief, Ford restates his contention that Florida administers the death penalty arbitrarily and discriminatorily on the basis of the race of the victim, the race of the defendant and other impermissible factors. With respect to this contention, we conclude that the district court's abuse of the writ holding was clearly correct. In addition, this contention fails on the merits. We do not belabor these conclusions since they have been the subject of expressions of approval by a majority of the justices of the Supreme Court. *Wainwright v. Ford*, —— U.S. ——, 104 S.Ct. 3498, 82 L.Ed.2d 911 (1984).

[3] Justice Frankfurter and several commentators have discussed the variety of justifications offered for the common law rule. *See Solesbee v. Balkcom*, 339 U.S. 9, 14-19, 70 S.Ct. 457, 459-62, 94 L.Ed. 604 (1950); Hazard & Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 U.C.L.A.L.Rev. 381, 383-89 (1962); Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 Stan.L.Rev. 765, 778-79 (1980); Note, *Insanity of the Condemned*, 88 Yale L.J. 533, 535-37 (1979). The most frequently discussed justifications are: (1) an insane person is incapable of assisting counsel in the fight to keep the sentence from being imposed; (2) the person's insanity is punishment enough; (3) a humanitarian mandate exists which prohibits executing insane persons; (4) the deterrence rationale would not be served by executing the insane because executing an insane individual does not serve as an example to others; (5) retribution is not had by executing the insane because killing one who is insane does not have the same moral quality as killing one who is sane; and (6) a person should not be executed while he is incapable of making peace with his maker. *Id.*

cedure for determining the sanity of a person under a death sentence. The test is whether the prisoner has the mental capacity to understand the nature of the death penalty and the reason it is to be imposed on him. *Fla. Stat.* § 922.07(2) (1983). The statutory procedure requires the governor to appoint a commission of three psychiatrists and to make a determination as to the prisoner's sanity after receiving the commission's report. Ford does not challenge the state's compliance with the statutory procedure.

Ford contends that the prohibition against execution because of insanity is rooted in the eighth amendment. No federal appellate court has so held. There has, however, been considerable comment supportive of his contention.[4] Prior references in Justice Frankfurter's dissent in *Solesbee v. Balkcom*, 339 U.S. 9, 14, 70 S.Ct. 457, 459, 94 L.Ed. 604 (1950), and Justice Harlan's concurring opinion in *Caritativo v. California*, 357 U.S. 549, 550, 78 S.Ct. 1263, 2 L.Ed.2d 1531 (1958), were to the effect of due process rights on the execution of insane persons. Ford argues, however, that these opinions failed to consider the implication of the eight amendment because they predated recognition that the eighth amendment is incorporated by the fourteenth as a limitation on the power of the states.[5] The only substantive difference between Ford's eighth amendment claim and the Florida statute is based on Frankfurter's contention in *Solesbee* that a defendant must be sufficiently competent to cooperate with his attorney in providing reasons why his execution should not be carried out. Since Ford has exhausted both his merits appeal and his collateral attacks, he concedes that this substantive distinction is not material in his case.

---

[4] See Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 Stan.L. Rev. 765 (1980); Note, *Insanity of the Condemned*, 88 Yale L.J. 533 (1979).

[5] *See Robinson v. California*, 370 U.S. 660, 666-67, 82 S.Ct. 1417, 1420, 8 L.Ed.2d 758 (1962).

Ford argues, however, that procedural protections comporting to federal due process standards would inexorably follow from recognition of the federal constitutional basis of his substantive right. He contends that the Florida statute, which is essentially an ex parte procedure conducted by the executive, falls short of those due process standards.

If the matter were being presented for the first time, Ford's contention might present considerable difficulty. The panel majority, however, feels that Ford's contention is foreclosed by binding authority. In *Solesbee* the Supreme Court examined a Georgia procedure which was virtually identical to that now incorporated in the Florida statute. In the controlling portion of the opinion the Supreme Court held: "We are unable to say that it offends due process for a state to deem its Governor an 'apt and special tribunal' to pass upon a question so closely related to powers that from the beginning have been entrusted to governors." *Solesbee v. Balkcom*, 339 U.S. at 12, 70 S.Ct. at 458 (footnote omitted).

Ford argues that the development of eighth amendment law has so eroded the underpinnings of *Solesbee* that it no longer can be considered as binding authority. That contention is confronted, however, with this court's opinion in *Goode v. Wainwright*, 731 F.2d 1482 (11th Cir.1984), in which we considered an attack on the specific statute now in question and held: "The second claim, the attack on the Florida statute, is made on procedural due process grounds. We hold that the statute meets minimum standards required by procedural due process." *Id.* at 1483. The authority cited in support of that holding was *Solesbee* and *Caritativo*. Under the rule of precedent applicable in this circuit,[6] the majority regards this holding as binding. Ford contends that his facts are somewhat distinguishable from those in *Goode*, but the statute is precisely the same. Ford contends that the analytical

---

[6] *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (1981).

underpinnings of *Solesbee* have been eroded but the facts are indistinguishable from those now before us. Together, our recent reliance on *Solesbee* and our determination that the Florida statute meets minimum standards required by procedural due process is sufficient to require that a panel of this court reject Ford's contention. If our application of *Solesbee* and *Goode* is to be altered, it must be done by the Supreme Court or at least by this court sitting en banc.

AFFIRMED.

CLARK, Circuit Judge, dissenting:

I respectfully dissent. In the law, as in many other disciplines, where one ends up is frequently determined by where one begins. The majority fails to address and decide whether there is a constitutional prohibition against execution of an insane person. The court says that "[n]o federal appellate court has so held." Majority opinion at 4. Before addressing a party's constitutional due process rights, it is necessary to first decide the substantive constitutional right to which he is entitled, if any. Dissenting, Justice Frankfurter challenged the majority of the Court in *Solesbee* to reach the issue, saying:

> If the Due Process Clause of the Fourteenth Amendment does not bar the State from infliction of the death sentence while such insanity persists, of course it need make no inquiry into the existence of supervening insanity. If it chooses to make any inquiry it may do so entirely on its own terms. If the Due Process Clause does limit the State's power to execute such an insane person, this Court must assert the supremacy of the Due Process Clause and prohibit its violation by a State.
>
> The Court in an easy, quick way puts crucial problem to one side as not before us. But in determining what procedural safeguards a State must provide, it makes all the difference in the world

> whether the United States Constitution places a substantive restriction on the State's power to take the life of an insane man. If not to execute is merely a benevolent withholding of the right to kill, the State may exercise its benevolence as it sees fit. But if Georgia is precluded by the Due Process Clause from executing a man who has temporarily or permanently become insane, it is not a matter of grace to assert that right on behalf of the life about to be taken. If taking life under such circumstances is forbidden by the Constitution, then it is not within the benevolent discretion of Georgia to determine how it will ascertain sanity. Georgia must afford the rudimentary safeguards for establishing the fact. If Georgia denies them she transgresses the substance of the limits that the Constitution places upon her.

Solesbee v. Balkcom, 339 U.S. 9, 15, 70 S.Ct. 457, 460, 94 L.Ed. 604 (1950) (Justice Frankfurter dissenting).

A panel of this court granted Ford's application for a certificate of probable cause and stayed his execution so that this court could fully address Ford's substantial procedural and substantive Eighth and Fourteenth Amendment" claim of right not to be executed while insane. 734 F.2d 538. A majority of the Supreme Court refused the State of Florida's application to vacate this court's stay of execution of sentence of death and explicitly turned its decision on the issue presented by the majority opinion and this dissent. *Wainwright v. Ford*, —— U.S. ——, 104 S.Ct. 3498, 82 L.Ed.2d 911 (1984). Justice Powell, the writing Justice, in a footnote stated: "This Court has never determined whether the Constitution prohibits execution of a criminal defendant who currently is insane, and I imply no view as to the merits of this issue." *Id.* 104 S.Ct. at 3498.

Believeing that it is necessary that we first resolve whether Ford has a substantive Constitutional claim, this will be considered before analyzing the due process pro-

cedural requirements. Because the majority and I have different starting points, we therefore come to different conclusions. In my view, a proper resolution of the issues in this case must begin with an inquiry into whether there is an Eighth Amendment right not to be executed while insane.

The Eighth Amendment and the Right Not to be Executed While Insane

The Supreme Court has developed a two-part standard for assessing Eighth Amendment claims. This analysis inquires whether a challenged punishment is both acceptable to contemporary standards of decency and comports with the dignity of man. *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976) (plurality opinion). The contemporary standards of decency test examines the constitutionality of a challenged punishment by referring to domestic public acceptance of that sanction. *Woodson v. North Carolina*, 428 U.S. 280, 288-301, 96 S.Ct. 2978, 2983-2989, 49 L.Ed.2d 944 (1976) (plurality opinion); *Gregg, supra*, 428 U.S. at 176-82, 96 S.Ct. at 2926-29. The human dignity component generally examines whether a punishment is grossly disproportionate because of the severity of the offense and/or is accompanied by the unnecessary infliction of pain. *Gregg, supra*, 428 U.S. at 173, 96 S.Ct. at 2925. The Court has looked primarily to objective evidence such as historical usage in the statutes of the various states to give content to the concepts of decency and dignity. *See, e.g., Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed.2d 982 (1977) (plurality opinion); *Gregg, supra*, 428 U.S. at 173, 96 S.Ct. at 2925. However, the Court has also said that it will perform an independent judicial assessment of the constitutionality of the practice in question in addition to relying on the objective evidence. For example, in *Coker v. Georgia, supra*, the Court stated that contemporary public attitudes towards punish-

ing rape by death informed and confirmed its own independent judgment but did not wholly determine the controversy, for "the Constitution contemplates in the end our own judgment will be brought to bear on the question." 433 U.S. at 597, 97 S.Ct. at 2868. The Court in *Coker* held that the death penalty was disproportionate for the crime of rape. An application of the Supreme Court's analysis of Eighth Amendment claims to the issue in question in this case leads to the conclusion that the execution of one who is presently insane would violate the Eighth Amendment.

The History of Executing of Insane

It has been a part of the English common law since the medieval period that the presently incompetent should not be executed. Feltham, *The Common Law and the Execution of Insane Criminals*, 4 Mel.U.L.Rev. 434, 466-67 (1964). *See also* E. Coke, *Third Institute* 4, 6 (London 1797) (1st ed. London 1644); 4 W. Blackstone, *Commentaries* 24.[1] In the United States, early commentary and decisions reflected the same attitude towards the execution of the presently insane. *See, e.g.*, 1 F. Wharton, *A Treatise on the Criminal Law* § 59, at 89 (8th ed. Philadelphia 1880 (1st ed. Philadelphia 1846); *State v. Vann*, 84 N.C. 722 (1881). State courts have continued to reaffirm the English common law rule of preventing the execution of the presently insane. *See, e.g., Ex Parte Chesser*, 93 Fla. 590, 594, 112 So. 87, 89 (1927); *Hawie v. State*, 121 Miss. 197, 216-18, 83 So. 158, 159, 160 (1919); *In re Grammer*, 104 Neb. 744, 746-49, 178 N.W. 624, 625-26 (1920). Therefore, the English and American common law prevented the execution of the presently insane. At present, virtually all of the states that have the death

---

[1] For a more detailed analysis of the common law history, see Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 Stan.L.Rev. 765; Note, *Insanity of the Condemned*, 88 Yale L.J. 533 (1979).

penalty have statutes that prohibit executing the insane,[2] although the procedures for enforcing the legislative mandate of the various jurisdictions varies widely. Regard-

---

[2] Twenty-two states have enacted statutory procedures explicitly prohibiting the execution of a prisoner who has been found presently incompetent. Ala.Code § 15-16-23 (1981); Ariz.Rev.Stat.Ann. § 13-4021 *et seq.* (1982); Ark.Stat.Ann. § 43-2622 (1977); Cal.Penal Code § 3700 *et seq.* (1979); Conn.Gen.Stat. § 54-101 (1980); Fla. Stats. § 922.07 (1983); Ga.Code Ann. § 17-10-60 *et seq.* (1982); Ill.Rev.Stat. ch. 38, § 1005-2-3 (1982); Kan.Stat. § 22-4006 (Supp. 1981); Md.Ann.Code art. 27, § 75 (Cum.Supp. 1983); Mass.Gen. Laws Ann. ch. 279, § 62 (Supp. 1984); Miss.Code Ann. § 99-19-57 (Supp. 1983); Mo.Rev.Stat. § 552.060 (Supp. 1983); Mont.Code Ann. § 46-19-201 *et seq.* (1983); Neb.Rev.Stat. § 29-2537 *et seq.* (1979); Nev.Rev.Stat. § 176.425 *et seq.* (1983); N.M.Stat.Ann. § 31-14-4 *et seq.* (1978); N.Y.Correc.Law § 655 *et seq.* (Supp. 1983); Ohio Rev.Code Ann. § 2949.28 *et seq.* (Supp. 1982); Okla.Stat.Ann. title 22, § 1004 *et seq.* (1983); Utah Code Ann. § 77-19-13 (1982); Wyo.Stat. § 7-13-901 *et seq.* (Cum.Supp. 1984).

Five states which authorize capital punishment have adopted statutes requiring the transfer of any mentally disordered prisoner to a state mental hospital. *See* 11 Del.Code Ann. § 406 (1982); Ind.Code Ann. § 11-10-4-1 *et seq.* (1983); N.C.Gen.Stat. § 15A-1001 (1983); S.C. Code Ann. § 44-23-210 *et seq.* (Supp. 1983); Va. Code § 19.2-177 (1983).

Except in cases involving a woman supposedly pregnant, only the governor can reprieve a death sentence in Idaho. Idaho Code § 19-2708 (1979). But Idaho adopts the common law absent a specific statutory provision, *id.* § 73-116 (1973), and the common law prohibits the execution of the presently incompetent. Therefore, the Idaho statute should apply for the presently incompetent.

Four states have statutes that grant the governor, or some other authority discretion to stay the execution of the presently incompetent. *See* Ark.Stat.Ann. § 43-2622 (1977); Ga.Code Ann. § 27-2602 (1978); Mass.Ann.Laws ch. 279, § 48 (Michie/Law.Co-op 1963); N.H.Rev.Stat.Ann. § 4-24 (1970).

Four states have adopted, by case law, the common law rule prohibiting the execution of the presently incompetent. *State v. Allen*, 204 La. 513, 516, 15 So.2d 870, 871 (1943); *Commonwealth v. Moon*, 383 Pa. 18, 22-23, 117 A.2d 96, 99, 100 (1955); *Jordan v. State*, 124 Tenn. 81, 90-91, 135 S.W. 327, 329-30 (1911); *State v. Davis*, 6 Wash.2d 696, 717, 108 P.2d 641, 651 (1940) (dictum).

less, the objective criteria both historical and present are uniform in their rejection of the penalty of death for the presently insane. Contemporary standards of decency clearly indicate the execution of an insane person would violate the Eighth Amendment.

The question of whether the execution of the insane would be in conflict with the dignity of man, the basic concept underlying the Eighth Amendment, *Gregg, supra*, 428 U.S. at 173, 96 S.Ct. at 2925, is closely linked to an assessment of the contemporary standards of decency. 428 U.S. at 175, 96 S.Ct. at 2926. However, an independent assessment of such a practice leads to the same conclusion. It is a basic tenet in our society that true mental illness is not a voluntary disease that can be controlled. To execute one who is insane is to extinguish the life of a person in a completely helpless condition. This person cannot truly understand what is about to happen to him, cannot assist an attorney in any viable legal issue that may still be present in his case, cannot adequately prepare for imminent death, or depending on the particular person and his religion, make his peace with God. The execution of an insane person will not further the penalogical justifications for capital sentencing, deterrence and/or retribution.

Retribution is generally perceived as "an expression of society's moral outrage." *Gregg*, 428 U.S. at 183, 96 S.Ct. at 2929. However, the social goal of retribution is frustrated when the power of the State is exercised against one who does not comprehend its significance. *See* Note, *Imcompetency to Stand Trial*, 81 Harv.L.Rev. 454, 458-59 (1967); *Musselwhite v. State*, 215 Miss. 363, 60 So.2d 807 (1952).[3]

---

[3] "Amid the darken midst of mental collapse, there is no light against which the shadows of death may be cast. It is revealed that if you were taken to the electric chair, he would not quail or take account of its significance." *Id.* 60 So.2d at 809. *See also* Note, *Insanity of the Condemned*, 88 Yale L.J. 533, 536 n. 17 (1979) (execution of the presently insane is executing a person who for all moral purposes is not the same person who committed the crime).

Furthermore, deterrence is not served by the execution of the mentally incompentent. Prospective offenders of capital crime would not identify with an insane person who is executed. As one commentator said: "[H]ow could the execution of a man incapable of understanding any law, operate more as a warning to others to avoid the violation of the law, than the public punishment of a dog? The one would be a spectacle of horror, the other of ridicule." Collinson, *A Treatise on Law Concerning Idiots, Lunatics, and Other Persons Non Compos Mentis* 472 (1812).

Therefore, a view of the historical and objective evidence as well as an independent judicial assessment of the execution of the presently insane leads to the conclusion that such an act violates both contemporary standards of decency and the basic dignity of man. Therefore, there is an Eighth Amendment right not to be executed while presently insane.

Further support for this conclusion regarding the Eighth Amendment is found in *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637. The Supreme Court said that there can be no doubt that the Bill of Rights guaranteed at least the liberties and privileges that Englishmen had at the time the Bill of Rights was adopted. The Court went on to say:

> When the framers of the Eighth Amendment adopted the language of the English Bill of Rights, . . . one of the consistent themes of the era was that Americans had all of the rights of English subjects . . . . Thus, our Bill of Rights was designed in part to insure that these rights were preserved. Although the framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the Bill of Rights is convincing proof that they intended to provide at least the same protection—including the right to be free from excessive punishments.

103 S.Ct. at 3007, n. 10. The framers of the Bill of Rights were familiar with the English common law. As stated earlier in this opinion, the execution of the insane was seen as cruel and unusual punishment in England at the time of the adoption of the Eighth Amendment. Therefore, even under a strict view of the Eighth Amendment, *i.e.* that a punishment is cruel and unusual only if it is similar to punishments considered cruel and unusual at the time the Bill of Rights was adopted, *Furman v. Georgia*, 408 U.S. 238, 264, 92 S.Ct. 2726, 2739, 33 L.Ed.2d 346 (1972) (Brennan, J., concurring), the execution of the insane is prohibited. At the time the Bill of Rights was adopted, the execution of the insane was clearly perceived to be a different kind of punishment than was the execution of one who is not insane. Therefore, as a first principle, it is unequivocably established that there is a constitutional right not to be executed while insane. The question then becomes whether Florida's procedures are adequate to protect this Eighth Amendment right.

The Procedural Requirements Stemming from the Eighth Amendment Right Not to be Executed While Insane

The State of Florida has created an administrative proceeding in which the governor determines whether an individual under sentence of death is competent to be executed. F.S.A. § 922.07 (1983). That proceeding essentially provides little due process rights for the individual. When the governor is informed that a person may be insane, he must stay the execution of sentence and appoint three psychiatrists to examine the convicted person "to determine whether he understands the nature and effect of the death penalty and why it is to be imposed upon him." F.S.A. § 922.07(1). The examination is to take place with all three psychiatrists present at the same time. Defense counsel and the prosecutor may be present at the examination and if the prisoner sen-

tenced to death has no counsel the trial court shall appoint counsel to represent him. *Id.* However, no hearing is held and no provision is made for advocacy. The present governor has a publicly announced policy of "excluding all advocacy on the part of the condemned from the process of determining whether a person under sentence of death is insane."[4] After receiving the psychiatrists' report, the governor makes a decision. If the governor decides that the convicted person does not meet the prescribed competency test, then he orders the person committed to the state hospital. If he decides that the person is sane, then the governor issues the death warrant ordering execution. F.S.A. § 922.07(2) and (3). There are no written findings and there is no judicial review of the decision. The Florida Supreme Court held in this case that "the statutory procedure is now the exclusive procedure for determining competency to be executed." *Ford v. Wainwright*, 451 So.2d 471, 475 (Fla.1984). The issue of sanity cannot be raised independently in the state judicial system. *Id.*

This procedure does not adequately protect a person's Eighth Amendment right not to be executed while insane. The fact that we are considering a federal constitutionally protected right (rather than a state created right which may be afforded some due process protections[5]) requires more process than the Florida procedure gives. Because of the qualitative difference of the death penalty, the Supreme Court has articulated a procedural component to the Eighth Amendment. In this vein, the Court has been chiefly concerned "with the procedure by which the state imposes the death sentence . . . ." *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 3451, 77 L.Ed.2d 1171 (1983). The qualitative difference of the death penalty requires a "corresponding difference in the need for reliability in the determination that death is the ap-

---

[4] *Goode v. Wainwright*, 448 So.2d 999 (Fla. 1984).

[5] See discussion, *supra*, pages 528-529.

propriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). Just last term, the Court stated, "We reaffirm our commitment to the demands of reliability in decisions involving death . . ." *Spaziano v. Florida*, —— U.S. ——, ——, 104 S.Ct. 3154, 3160, 82 L.Ed.2d 340, 349 (1984). Florida's procedures do not comport with the procedural component of the Eighth Amendment's standards for reliability.

Admittedly, we are not reviewing here the question of whether death is the appropriate punishment for Mr. Ford and the procedures used to make that decision. Nevertheless, the procedure used to determine whether the death penalty is a permissible punishment for him at this time is being reviewed. The reliability required for capital decisions is still relevant and adequate procedures to determine his *present* death eligibility are still required. We have not held in any case that a substantive constitutional right is adequately protected by an administrative ex parte hearing conducted by the executive branch of state government. It is the role of the courts, both state and federal, as the expositors of the dimensions of constitutional rights to make this decision. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

A judicial hearing is required in order to provide the "adversarial debate our system recognizes as essential for the truth seeking function." *Gardner v. Florida*, 430 U.S. 349, 359, 97 S.Ct. 1197, 1205, 51 L.Ed.2d 393 (1977). It is a fundamental tenet of our judicial system and, therefore, our system for protecting constitutional rights, that there is "no better instrument . . . for arriving at truth." *Joint Anti-Fascist Refugee Commission v. McGrath*, 341 U.S. 123, 171, 71 S.Ct. 624, 648, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). Adversary hearings serve as an institutional check on arbitrary and impermissible action and no other procedure effectively

fosters the same belief that one has been dealt with fairly even if there remains a disagreement with the result. *Gray Panthers v. Schweiker*, 652 F.2d 146, 162 (D.C.Cir. 1980). The Florida procedure is totally lacking in due process protection. There is no room for advocacy,[6] no written findings, and no judicial review. The executive branch of state government which prosecuted the defendant makes an unreviewable decision as to whether he receives the protection of the constitutional right not to be executed if insane. Therefore, there are no protections against erroneous or arbitrary decisions as to the person's competency.

The conclusion that the Florida procedure is inadequate is supported by the Supreme Court's habeas corpus decisions. In *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), the Court addressed the situation of whether it was mandatory to hold an evidentiary hearing on constitutional claims presented in habeas corpus actions. The Court said: "Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in his state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state court trier of fact has, after a full hearing, reliably found the relevant facts." 372 U.S. at 312, 83 S.Ct. at 756. *See also Thomas v. Zant*, 697 F.2d 977, 980-81 (11th Cir.1983). The Court in *Townsend* then set out categories of cases where a hearing must be held. These categories focus upon the reliability of the state court proceedings to vindicate the constitutional right. *Townsend, supra*, 372 U.S. at 313, 83 S.Ct. at 757. These categories were enacted in the federal habeas corpus statute, 28 U.S.C. § 2254(d), where Congress defined the situations in which state court

---

[6] The petitioner cannot call witnesses, cross-examine the doctors who render the decision, or present argument on his behalf.

fact-findings are entitled to a "presumption of correctness by the federal courts." Again, the focus is on reliability. *Townsend* thus sets forth the threshold standards of determining whether a hearing must be held and whether § 2254(d) governs the state decision. *See Guice v. Fortenberry*, 661 F.2d 496 (5th Cir.1981) (en banc).

Section 2254(d) assumes that there will be findings made by a state court. In this case, there was no hearing and thus no court determination. Furthermore, § 2254 (d)(1) provides that federal courts will not defer to state fact-finding if the merits were not resolved in the state court hearing. Subsection (2) of § 2254(d) precludes giving deference to a fact-finding procedure employed by the state which was not adequate to afford a full and fair hearing. Subsection (3) of the same statutory section precludes deference if the material facts were not adequately developed at the state court hearing. Finally, subsection (6) requires that no deference be accorded if the petitioner did not receive a full, fair and adequate hearing in the state court proceeding. The facts as to Ford's sanity are in sharp dispute and have never been reached or resolved by a hearing in the state court or otherwise. As we said in our previous decision in this case, "credible evidence . . . indicates that Ford is insane." *Ford v. Strickland*, 734 F.2d 538, 539 (11th Cir. 1984).

Contrary to the holding of the majority, Ford's crimes are not foreclosed by *Solesbee v. Balkcom*, 339 U.S. 9, 70 S.Ct. 457, 94 L.Ed. 604 (1950); *Caritativo v. California*, 357 U.S. 549, 78 S.Ct. 1263, 2 L.Ed.2d 1531 (1958), or, *Goode v. Wainwright*, 731 F.2d 1482 (11th Cir.1984). In none of these three cases did the Court reach a judicial determination that a person has a constitutional right not to be executed when insane. The majority opinion and the dissent concur that no federal appellate court has decided this issue.

Solesbee and *Caritativo* were decided before the Eighth Amendment was applied to the states through the Due Process Clause of the Fourteenth Amendment. The

Eighth Amendment was incorporated in the case of *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 728 (1962). Additionally, those two cases were decided before the Supreme Court drastically altered the constitutional framework in which a citizen in this country can be executed.[7] Therefore, they are inapplicable in deciding what the Eighth Amendment requires procedurally before a person who maintains that he is incompetent can be executed.

A certificate of probable cause was denied in *Goode* because "[a]ssuming that there is such a right [not to be executed when insane], we agree with the district court that petitioner is barred from raising it in this case because of abuse of the writ." *Goode v. Wainwright*, 731 F.2d 1482, 1483 (11th Cir.1984) (citations omitted). The denial of a certificate is a holding that the appeal is frivolous and is a decision by the court that it will not consider the case on its merits. *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983).

The majority thus errs in relying upon an opinion that did not consider on their merits the issues considered herein. The decision of this court to deny Goode's certificate for probable cause was appealed to the Supreme Court which summarily refused to stay the execution. *Goode v. Wainwright*, —— U.S. ——, 104 S.Ct. 1721, 80 L.Ed.2d 192 (1984) (unpublished order denying certiorari). Both courts decided the case on April 4, 1984.

---

[7] *See Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), as well as the above discussion. At the time *Solesbee* and *Caritativo* were decided, there was nothing constitutionally impermissible with "committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases." *McGautha v. California*, 402 U.S. 183, 207, 91 S.Ct. 1454, 1467, 28 L.Ed.2d 711 (1971). *McGautha*, like *Solesbee* and *Caritativo*, was decided on the basis of the Fourteenth Amendment and not on Eighth Amendment grounds. In *Furman* and *Gregg*, the Court recognized and began to explicate the Eighth Amendment parameters of capital sentencing.

The present case has a different history. The panel of this court granted the certificate of probable cause on May 30, 1984, because there was no abuse of the writ. The execution was stayed to permit decision of the important issue. As stated previously, the Supreme Court refused to vacate our stay. *Wainwright v. Ford*, —— U.S. ——, 104 S.Ct. 3498, 82 L.Ed.2d 911, and Justice Powell noted that this issue has not been decided by the Supreme Court *Supra*, 104 S.Ct. at 3498.

It is apparent that the Supreme Court considered that *Goode* was decided on the issue of abuse of the writ and that it was presented the issue of whether our court erred in denying the certificate of probable cause. It is just as apparent that the Supreme Court refused to vacate the May 30, 1984, stay of execution so that this court could consider the important issues of whether a person sentenced to die has the right not to be executed if he is insane, and if he has that right, whether he is entitled to a due process hearing to make the determination of this factual issue.

The district court should be reversed and the case remanded for an evidentiary hearing pursuant to 28 U.S.C. § 2254(d) to determine whether Ford is insane.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5372

ALVIN BERNARD FORD, or CONNIE FORD, individually,
and acting as next friend on behalf of
ALVIN BERNARD FORD, PETITIONERS-APPELLANTS

versus

LOUIE L. WAINWRIGHT, Secretary
Department of Corrections,
State of Florida, RESPONDENT-APPELLEE

Appeal from the United States District Court for the
Southern District of Florida

**ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC**

(Opinion January 17, 1985, 11 Cir., 198—, —— F.2d ——).
(June 3, 1985)

Before VANCE and CLARK, Circuit Judges, and STAFFORD *, District Judge.

---

* Hon. William H. Stafford, Jr., U.S. District Judge for the Northern District of Florda, sitting by designation.

PER CURIAM:

* * * *

(X) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

[Section 922.07, *Florida Statutes* (1983), as amended (1985)]

922.07 Proceedings when person under sentence of death appears to be insane.—

(1) When the Governor is informed that a person under sentence of death may be insane, he shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person. The Governor shall notify the psychiatrists in writing that they are to examine the convicted person to determine whether he understands the nature and effect of the death penalty and why it is to be imposed upon him. The examination of the convicted person shall take place with all three psychiatrists present at the same time. Counsel for the convicted person and the state attorney may be present at the examination. If the convicted person does not have counsel, the court that imposed the sentence shall appoint counsel to represent him.

(2) After receiving the report of the commission, if the Governor decides that the convicted person has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him, he shall issue a warrant to the warden directing him to execute the sentence at a time designated in the warrant.

(3) If the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him, he shall have him committed to the state hospital for the insane.

(4) When a person under sentence of death has been committed to the state hospital for the insane, he shall be kept there until the proper official of the hospital determines that he has been restored to sanity. The hospital official shall notify the Governor of his determination, and the Governor shall appoint another commission to proceed as provided in subsection (1).

(5) The Governor shall allow reasonable fees to psychiatrists appointed under the provisions of this section which shall be paid by the state.

History.—s. 268, ch. 19554, 1939; CGL 1940 Supp. 8663 (278); s. 134, ch. 70-339.

CHAPTER 85-193

Senate Bill No. 1185

An act relating to executions; amending s. 922.07, F.S.; directing the Governor to have certain condemned persons committed to the Department of Corrections Mental Health Treatment Facility; directing the facility administrator to notify the Governor of certain findings; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (3) and (4) of section 922.07, Florida Statutes, are amended to read:

922.07 Proceedings when person under sentence of death appears to be insane.—

(3) If the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him, he shall have him committed to a *Department of Corrections mental health treatment facility* [the state hospital for the insane.]

(4) When a person under sentence of death has been committed to a *Department of Corrections mental health treatment facility* [the state hospital for the insane,] he shall be kept there until the *facility administrator* [proper official of the hospital] determines that he has been restored to sanity. The *facility administrator* hospital official shall notify the Governor of his determination, and the Governor shall appoint another commission to proceed as provided in subsection (1).

Section 2. This act shall take effect upon becoming a law.

Approved by the Governor June 18, 1985.

Filed in Office of Secretary of State June 18, 1985.

CODING: Words in [Bracketed Type] are deletions from existing law; words in [Italicized Type] are additions.

SUPREME COURT OF THE UNITED STATES

No. 85-5542

ALVIN BERNARD FORD, ETC., PETITIONER

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 9, 1985